Supreme Court, U.S.
FILED
06-643 NOV 6 - 2006
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TODD A. FRANKEL
Counsel of Record
ANDREW J. JARZYNA
THOUFIQ A. KUTTY
LINDSAY WILSON GOWIN
333 West Wacker Drive,
Suite 2100
Chicago, IL 60606
(312) 407-0700

QUESTIONS PRESENTED

At Stacey Miller's federal drug trial, substitute trial counsel told the jury in her opening statement that she would present several alibi witnesses as part of an alibi and misidentification defense. Both the original trial counsel (who was mentally ill) and substitute trial counsel (who stated on the record that she did not adequately prepare to try the case), however, failed to timely provide notice of three alibi witnesses who would have testified that Miller was out of town on the day in question. Counsel's failure resulted in the trial court excluding the witnesses' alibi testimony.

On post-conviction review, the district court denied Miller's *pro se* petition, which was based upon, *inter alia*, ineffective assistance of counsel for failure to timely provide notice of alibi witnesses. Without oral argument, a divided panel of the Seventh Circuit issued an unpublished order in which the court summarily affirmed and adopted the district court's opinion. The dissenting judge objected to this summary treatment because, *inter alia*, the district court's opinion did not respond to arguments brought by appointed counsel in the Seventh Circuit. Among other things, appointed counsel argued that Miller should receive a new trial based on Sixth Circuit authority dictating a new trial on the same claim and similar facts. The dissenting judge, after discussing numerous problems with the summary treatment of Miller's appeal, clearly noted that he "would set this case for oral argument in due course."

This case thus presents the following important questions:

1. Whether the failure to hold oral argument by a divided panel of a federal court of appeals violates the unanimity requirement of Federal Rule of Appellate Procedure 34(a)(2) and procedural due process where the dissenting judge objects to the panel's summary treatment of an appeal and explicitly states a desire for oral argument.

2. Whether the Seventh Circuit erroneously denied relief on an ineffective assistance of counsel claim where *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004), dictates a new trial on the same claim and similar facts, and 28 U.S.C. § 2255 mandates, at a minimum, an evidentiary hearing.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Pretrial Proceedings 2

B. Miller's Trial And The Exclusion Of Alibi Witnesses 3

C. Post-Conviction Proceedings 6

REASONS FOR GRANTING THE PETITION 8

I. VIOLATION OF RULE 34(a)(2) CONSTITUTES A DEPRIVATION OF DUE PROCESS, IGNORES THE POLICY CHOICE MADE BY CONGRESS AND THE FEDERAL JUDICIARY, AND IS A SIGNIFICANT PROBLEM ACROSS THE CIRCUITS 9

A. The Seventh Circuit Denied Oral Argument In Violation Of Rule 34(a)(2) 9

B. The Seventh Circuit's Violation Of Rule 34(a)(2) Deprived Miller Of Procedural Due Process 9

C. Rule 34(a)(2) Reflects A Policy Choice By Congress And The Federal Judiciary Favoring Assurance Of Correct Results Over Additional Judicial Economy 11

D. Violation Of Rule 34(a)(2) Is Recognized By Judges And Academics As A Significant Problem Existing Across The Courts Of Appeals 13

II. THE SEVENTH CIRCUIT ERRONEOUSLY DENIED MILLER ANY FORM OF RELIEF IN CONFLICT WITH SIXTH CIRCUIT AUTHORITY THAT DICTATES A NEW TRIAL AND 28 U.S.C. § 2255, WHICH MANDATES, AT A MINIMUM, AN EVIDENTIARY HEARING 15

A. The Divided Panel Of The Seventh Circuit's Decision Conflicts With Sixth Circuit Authority That Dictates A New Trial On The Same Claim And Similar Facts 15

B. The Divided Panel Of The Seventh Circuit's Decision Conflicts With The Standard For An Evidentiary Hearing Mandated By 28 U.S.C. § 2255 19

CONCLUSION 20

APPENDIX

TABLE OF AUTHORITIES

CASES

Armstrong v. Manzo,
380 U.S. 545 (1965) 9, 10

Baldwin v. Hale,
68 U.S. 223 (1863) 9

Board of Regents v. Roth,
408 U.S. 564 (1972) 11

Bowers v. DeVito,
686 F.2d 616 (7th Cir. 1982) 13

Clinkscale v. Carter,
375 F.3d 430 (6th Cir. 2004) 15-19

Evitts v. Lucey,
469 U.S. 387 (1985) 10

FCC v. WJR,
337 U.S. 265 (1949) 10

Fuentes v. Shevin,
407 U.S. 67 (1972) 9, 10

Gravatt v. Paul Revere Life Ins. Co.,
No. 02-17028, 2004 WL 1257716
(9th Cir. 2004) 13

Koskela v. United States,
235 F.3d 1148 (8th Cir. 2001) 19

Machibroda v. United States,
368 U.S. 487 (1962) 19

Nelson v. Adams USA, Inc.,
529 U.S. 460 (2000) 10, 11

Slochower v. Bd. of Higher Educ.,
350 U.S. 551 (1956) 10

Strickland v. Washington,
466 U.S. 668 (1984) 15, 18

United States v. Lambert,
963 F.2d 711 (5th Cir. 1992) 13

United States v. Miller,
327 F.3d 598 (7th Cir. 2003) 6

Wolff v. McDonnell,
418 U.S. 539 (1974) 10

CONSTITUTIONS

U.S. Const. amend. V ..... *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 6

28 U.S.C. § 2255 ..... *passim*

FEDERAL RULES OF PROCEDURE

Fed. R. App. P. 1 9

Fed. R. App. P. 34(a)(2) ..... *passim*

Fed. R. Crim. P. 12.1 ..... 2, 4, 6

OTHER AUTHORITIES

Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*,
22 Fla. St. U. L. Rev. 913 (1995) 14

Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*,
72 Iowa L. Rev. 35 (1986) 13

Joe S. Cecil & Donna Stienstra, *Fed. Judicial Ctr., Deciding Cases Without Argument: An Examination of Four Courts of Appeals*, (1987)..... 12-14

Judicial Conference of the United States, Subcomm. On Long Range Planning, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679 (1995) 10

Judicial Facts and Figures, Table 2.2, http://www.uscourts.gov/judicialfactsfigures/Table202.pdf..... 14

Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio St. L. J. 1385 (1990)..... 14

Report of the Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975) 11, 12, 14

William M. Richman & William L Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996) 13

Petitioner Stacey Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals adopting and attaching the opinion and orders of the district court (App. 1a-18a) is unreported. The order of the court of appeals denying rehearing or rehearing en banc (*id.* at 32a) is unreported. The opinion and order of the district court denying post-conviction relief (*id.* at 19a-31a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 1, 2006, and petitioner's timely petition for rehearing or rehearing en banc was denied August 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 34(a)(2) provides:

> (2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a)(2).

The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life,

liberty, or property, without due process of law . . . ." U.S. Const. am V.

28 U.S.C. § 2255 provides in relevant part that: "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ." 28 U.S.C. § 2255.

STATEMENT OF THE CASE

A. Pretrial Proceedings

On July 24, 2001, the district court appointed James Cooley to represent Stacey Miller against two charges of distributing five grams or more of cocaine base on May 10, 2001, in Madison, Wisconsin. Soon thereafter, Cooley hired an investigator to verify Miller's alibi that he was out of state on May 10, 2001. (R. 111.) On September 27, 2001, the government filed a Demand for Notice of Alibi pursuant to Federal Rule of Criminal Procedure 12.1. (R. 29.) On October 8, 2001, Cooley filed a Notice of Alibi that Miller was in Chicago, Illinois, on May 10, 2001, at the time of the alleged transactions. (R. 40.) The Notice of Alibi stated that on May 10, 2001, between approximately 3:00 p.m. and 5:00 p.m., Miller met with Carleton Higgins "at Mr. Miller's mother's house." (*Id.*) On November 5, 2001, Cooley amended the Notice of Alibi to include Robert Morgan as an additional alibi witness. (R. 46.) Cooley also filed a sealed ex parte motion for subpoenas that included, *inter alia*, alibi witnesses Higgins, Morgan, Jacqueline Pollard (Miller's mother), and Princess Jordan (Miller's girlfriend). (R. 47 at 1-2.) The motion stated that "Pollard and Jordan will testify that, while not actually with the defendant at the specific time of the alleged sale in Madison, they both had seen him in Chicago on May 10, 2001, as well as throughout the week of May 7, 2001." (*Id.* at 2.) On November 7, 2001, Magistrate Judge Crocker granted the motion. (R. 56.)

On November 19, 2001, before jury selection on the first trial date, Cooley informed Judge Crabb that he was too ill to proceed. (R. 73.) Judge Crabb moved the trial to December 10, 2001. (*Id.*) On December 3, 2001, Cooley filed a motion to move the trial date a second time due to his continued

mental illness and indicated that "[i]n the unlikely event that counsel is still to[o] ill to proceed . . . Attorney Ralston would take over the case." (R. 82.) On December 4, 2001, Judge Crabb entered an order noting her conditional willingness to move the trial "to allow either present counsel or backup counsel, Krista Ralston, to try the case." (R. 83.) On December 7, 2001, Cooley wrote Judge Crabb agreeing to the January 28, 2002, trial date (R. 84) and Judge Crabb entered an order continuing the trial (R. 85). On December 17, 2001, Judge Crabb issued another order addressing the continuance of trial. (R. 87.) This order discussed the reasons for the second continuance, including the need for Ralston to prepare to try the case. (*Id.*) On Saturday, January 26, 2002, two days before the new trial date, Cooley was found unconscious in his car and hospitalized, resulting in Ralston taking over as trial counsel. (R. 116 at 5:18-6:18.)

B. Miller's Trial And The Exclusion Of Alibi Witnesses

On January 28, 2002, Miller's jury trial began in front of Judge Crabb. Before opening statements, Ralston noted on the record that she did not feel "adequately prepared to proceed" (*id.* at 3:18-21) despite the previous court orders, because she "didn't get as involved in preparing this case as [she] would have if [she] had thought [Cooley] was not well" (*id.* at 4:13-17). In response, Judge Crabb indicated that she thought Ralston would be preparing for trial given Cooley's illness and the uncertainty surrounding whether he would be able to try this case: "it was my understanding that there would be somebody working with Mr. Cooley at all times; because no one, particularly me, could be sure that Mr. Cooley would be ready to go to trial on the day it was scheduled." (*Id.* at 8:12-18.) Judge Crabb also noted problems with continuing the trial again, concluding "it's a problem that I think Mr. Cooley was supposed to be responsible for, and he was supposed to have somebody ready to go, completely ready to go if he couldn't, if he couldn't be ready." (*Id.* at 8:19-9:4.)

Following the discussion of Ralston's substitution as Miller's trial counsel, Miller's trial began with Ralston's opening statement which described an alibi and

misidentification defense to the jury. (R. 121 at 69:16-74:9.) As the cornerstone of this defense, Ralston told the jury that "[o]n the 10th of May, Mr. Miller was in Chicago." (*Id.* at 72:20.) Ralston noted that Miller had a pass from his parole agent to travel to Chicago. (*Id.* at 72:20-24.) Moreover, "[w]e will have *several* people testify that they saw him in Chicago and when they saw him and what he was doing there." (*Id.* at 72:24-25) (emphasis added.)

Following testimony that morning, the government expressed concern to the district court that Ralston represented in her opening statement that she would present "several" people to testify that Miller was in Chicago. The government noted that if "several" meant more than the two alibi witnesses Cooley properly disclosed, the undisclosed witnesses should be excluded. (R. 116 at 38:7-24.) Ralston responded that it was her "understanding that Mr. Cooley did turn over two other names. That is, Princess Jordan and Jackie Pollard." (*Id.* at 39:2-4.)

The government then argued for the exclusion of the witnesses' alibi testimony due to Cooley's failure to comply with Rule 12.1. (R. 113 at 4:16-5:7.) In the course of this argument, the government stated on the record that Ralston produced interview notes indicating Jordan and Pollard had alibi testimony to give:

> Now last night Ms. Ralston did fax to me witness notes I guess from the interviews conducted by investigators . . . it does appear Princess Jordan and [Jacqueline] Pollard may have had something to say to him about seeing Mr. Miller on or about this date of May 10th.

(*Id.*) Nevertheless, the district court excluded alibi testimony from anyone other than the two properly noticed alibi witnesses because, "Mr. Cooley had an obligation to advise [the government] quite awhile ago . . . ." (*Id.* at 5:16-19.) After the district court excluded the alibi witnesses, Ralston noted for the record that Jordan and Pollard had appeared at court to testify. (*Id.* at 5:25-6:6.)

The government presented seven witnesses at trial. (R. 144 at 6.) However, "[t]he main thrust of the government's

case" was the testimony of Bernard Gonzalez, the undercover police officer to whom Miller allegedly sold cocaine base, and Mark Winfield, Miller's former co-defendant. (*Id.*; R. 118 at 43:13-18.) The foundation of Gonzalez's testimony was his identification of Miller as the person who sold him cocaine base on May 10, 2001. Gonzalez initially made this identification at police offices from a photograph array that contained eleven photographs, all of which were of Miller. (R. 39 at 25:22-26:11, 31:4-14.) Gonzalez positively identified one photograph in this array as Miller. (*Id.*) Gonzalez shredded the notes upon which he made his May 10, 2001, police reports based upon a "personal" policy. (R. 113 at 29:11-30:20.)

The prosecution also elicited the testimony of Winfield, who received substantial benefits from the government for his testimony, including the right to plead guilty to only one of the six counts against him in exchange for his testimony against Miller. (*Id.* at 71:22-72:13.) Winfield reviewed the police reports describing Gonzalez's version of the events prior to testifying at trial. (*Id.* at 73:18-74:23.) At trial, Winfield described his history with Miller and their alleged drug connection. (*Id.* at 56:9-59:20.) As to the events of May 10, 2001, Winfield stated that he was at a barbershop the two times that Gonzalez called Winfield to buy cocaine base. (*Id.* at 61:8-62:21.) Winfield further testified that he called Miller both times and Miller sold Gonzalez cocaine base. (*Id.* at 61:22-62:6, 63:4-8.) Winfield also testified that after they were indicted, Miller told him to say that Miller was not there. (*Id.* at 68:18-25.) Finally, Winfield testified that Miller was going to call two witnesses to testify that he was in Chicago: "Bobby Morgan and Carlton." (*Id.* at 69:14-70:3.)

Due to the exclusion of Pollard and Jordan as alibi witnesses, and Higgins never arriving at the trial due to car trouble on his trip from Chicago to Madison (R. 118 at 53:1-9, ~~109:~~10-112:9), Ralston presented three witnesses in defense of Miller, with one, Morgan, providing alibi testimony. At one point during the trial, Sheneka Ware (Miller's sister) began to testify that she had personal knowledge of Miller going out of town on or around May 6

or 7, but the government objected based upon the court's previous Rule 12.1 ruling and the district court sustained the objection. (R. 118 at 72:17-23.)

Miller's lone alibi witness at trial, Morgan, lived three houses down from Miller's mother's (Pollard's) house. (R. 118 at 90:14-91:21.) Morgan testified that, while taking his daughter to and from school in Chicago on May 10, 2001, he saw Miller on Miller's mother's porch at approximately 11:00 a.m. and 2:20 p.m. (*Id.* at 92:3-93:5; 95:17-20.) On cross examination, Morgan denied telling a police detective that he only saw Miller around 10:00 a.m. on May 10, 2001. (*Id.* at 99:19-101:6.) Morgan also said he would not tell the jury if Miller had asked him to lie. (*Id.* at 108:25-109:3.) The government highlighted the fact that Ralston only presented Morgan as an alibi witness during closing argument: "doesn't it strike you perhaps as incredibly convenient that the one witness, Mr. Morgan, from the 4th to the 12th[,] he sees [Miller] or remembers seeing him on May 10, when he tells you that at 2:20 or so in the afternoon." (R. 123 at 52:2-6.)

On January 29, 2002, the jury found Miller guilty on both charged counts. On April 12, 2002, Judge Crabb sentenced Miller to 400 months on each count, with the sentences to run concurrently. On April 26, 2002, Miller filed a timely notice of appeal in which he claimed that the district court abused its discretion when it failed to grant a third continuance so Ralston could properly prepare to try the case. Miller also raised an ineffective assistance of counsel claim, but, as the Seventh Circuit noted, "chose wisely, at oral argument, to reserve that claim for a § 2255 petition." *United States v. Miller*, 327 F.3d 598, 601 (7th Cir. 2003). On May 1, 2003, the Seventh Circuit affirmed Miller's conviction.

C. Post-Conviction Proceedings

On July 28, 2004, Miller filed a timely *pro se* petition pursuant to 28 U.S.C. § 2255 (R. 136), for which the district court had jurisdiction pursuant to 28 U.S.C. § 1331, *see* 28 U.S.C. § 1331 (subject matter jurisdiction). On August 3, 2004, Miller amended his petition. (R. 137; R. 138.) In the

amended papers, Miller brought claims for, *inter alia*, ineffective assistance of counsel. (R. 137 at 4, 27-32; R. 138 at 18-22, 23-24.) On or about November 25, 2004, Miller submitted his traverse to the government's response, arguing, *inter alia*, ineffective assistance of counsel. (R. 147 at 37-38, 45-47, 57-65.) On or about December 7, 2004, Miller submitted affidavits from Cooley, Ralston, Pollard, and Ware. (R. 148; R. 150; R. 151; R. 152.) In these affidavits, Miller's trial counsel admitted that they provided ineffective assistance of counsel, Cooley asserts that he found Miller's alibi defense credible, and alibi witnesses Pollard and Ware elaborated upon the substance of their proposed alibi testimony. (*Id.*)

On December 29, 2004, the district court denied Miller's petition in its entirety, holding that Miller "has not made the necessary showing" on his pertinent ineffective assistance of counsel claims. (App. 28a.) Relatedly, the district court denied the affidavits as untimely, and stated that the affidavits would not have changed the outcome. (*Id.* at 29a.) On March 8, 2005, Judge Crabb issued a certificate of appealability as to Miller's ineffective assistance of counsel claims because she could not "say that a reasonable judge would not make a different decision" as to Miller's entitlement to relief on these claims. (*Id.* at 16a.)

On June 2, 2005, the Seventh Circuit appointed present counsel to represent Miller in his post-conviction appeal pursuant to the provisions of the Criminal Justice Act. On October 31, 2005, counsel filed a brief advocating that the allegations and evidence of trial counsel's ineffective assistance of counsel for failure to timely provide notice of three alibi witnesses and reasonably present an alibi defense entitled Miller to relief. On January 3, 2006, the government filed its response brief. On January 13, 2006, Miller filed his reply brief.

Without oral argument, on June 1, 2006, a divided panel of the Seventh Circuit issued an unpublished order in which the court summarily affirmed and adopted as its own the district court's December 29, 2004, opinion and order, and the March 8, 2005, orders. (App. 1a-18a.) The dissenting judge

objected to the summary treatment of Miller's appeal, noting, *inter alia*, that:

> In the case before us, the appeal cannot be considered facially frivolous. Indeed, both parties have submitted extensive and thoughtful briefs. Nor can the discussion of the issue on appeal by the district court be said to be totally responsive to the presentation of the appellant in this court. Finally, our order in this case, adopting the order of the district court, does not fulfill our obligation to provide the Supreme Court with an adequate explanation of our decision.

(*Id.* at 18a.) The dissenting judge concluded by stating that he "would set this case for oral argument in due course." (*Id.*) On August 8, 2006, the Seventh Circuit denied Miller's timely petition for rehearing or rehearing en banc. (*Id.* at 32a.)

REASONS FOR GRANTING THE PETITION

An exercise of this Court's supervisory is warranted because the arbitrary denial of oral argument in violation of Rule 34(a)(2) constitutes a deprivation of due process, ignores the policy choice by Congress and the Federal Judiciary favoring correct results over additional judicial economy, and is recognized by judges and academics as a significant problem existing across the courts of appeals. Moreover, the divided panel of the Seventh Circuit's erroneous denial of any form of relief on Miller's ineffective assistance of counsel claim conflicts with both Sixth Circuit authority that dictates a new trial on the same claim and similar facts, and the standard for an evidentiary hearing mandated by 28 U.S.C. § 2255.

I. VIOLATION OF RULE 34(a)(2) CONSTITUTES A DEPRIVATION OF DUE PROCESS, IGNORES THE POLICY CHOICE MADE BY CONGRESS AND THE FEDERAL JUDICIARY, AND IS A SIGNIFICANT PROBLEM ACROSS THE CIRCUITS

A. The Seventh Circuit Denied Oral Argument In Violation Of Rule 34(a)(2)

Federal Rule of Appellate Procedure 34(a)(2) dictates that, "[o]ral argument *must* be allowed in every case unless a panel of three judges who have examined the briefs and record *unanimously* agrees that oral argument is unnecessary . . . ."[1] Fed. R. App. P. 34(a)(2) (emphasis added). In this case, a divided panel of the Seventh Circuit issued an order summarily affirming and adopting the district court's opinion without holding oral argument despite the dissenting judge clearly stating that he "would set this case for oral argument in due course." (App. 18a.) Under the plain language of Rule 34(a)(2), since the panel did not unanimously agree that oral argument was unnecessary, the panel was required to hold oral argument in order to fully consider the merits of Miller's appeal. The Seventh Circuit's departure from the plain language of Rule 34(a)(2) warrants an exercise of this Court's supervisory power due to the importance of this violation of the Federal Rules of Appellate Procedure.

B. The Seventh Circuit's Violation Of Rule 34(a)(2) Deprived Miller Of Procedural Due Process

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard . . . .'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). "It is equally fundamental that the right to . . . an opportunity to be heard 'must be granted at a

---

[1] Federal Rule of Appellate Procedure 34(a)(2) applies to "all proceedings in the courts of appeals," including those brought pursuant to 28 U.S.C. § 2255. *See* Fed. R. App. P. 1 advisory committee notes.

meaningful time and in a meaningful manner.'" *Fuentes* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his [liberty or property]." *Fuentes* at 80.

"[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances . . . ." *FCC v. WJR*, 337 U.S. 265, 276 (1949) (citations omitted). This right is to be determined after consideration of "the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise . . . judicial . . . procedures, be taken into account." *Id.* at 277.

Because Congress prescribed a right to oral argument on appeal in defined circumstances, the arbitrary denial of that right violates due process, as "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *accord Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 559 (1956); *see also Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) (while the Constitution does not mandate that a state provide a system of appellate review, once it does, "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms").

Congress and the federal judiciary recognized and prescribed in Rule 34(a)(2) a right to oral argument "in every case" on appeal in the federal judicial system unless a panel of three judges "unanimously" agrees that oral argument is unnecessary.[2] *See* Fed. R. App. P. 34(a)(2); *see generally Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) ("The

---

[2] "Congress has authorized the federal judiciary to prescribe the rules of . . . procedure . . . subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules." Judicial Conference of the United States, Subcomm. On Long Range Planning, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 687 (1995).

Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees."). The Seventh Circuit's denial of oral argument in contravention of the express terms of Rule 34(a)(2)'s unanimity requirement therefore arbitrarily denied Miller a fundamental procedural safeguard recognized by Congress and the federal judiciary, a clear violation of procedural due process. *See generally Bd. of Regents v. Roth*, 408 U.S. 564, 591-92 (1972) (Marshall, J., dissenting) ("'Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.'" (citation omitted).

C. Rule 34(a)(2) Reflects A Policy Choice By Congress And The Federal Judiciary Favoring Assurance Of Correct Results Over Additional Judicial Economy

The 1979 amendment to Rule 34 added important safeguards against courts of appeals improperly dispensing with oral argument - the unanimity requirement and the corresponding minimum standard for judges to apply before dispensing with oral argument. *See* Fed R. App. P. 34(a) (effective August 1, 1979). The amendment was "patterned after the recommendations" in the Report of the Commission on Revision of the Federal Court Appellate System (hereinafter "Hruska Commission Report" or "Hruska Commission"). *Id.* at advisory committee notes; *see generally* Report of the Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 255 (1975) (recommendations regarding oral argument).

Congress created the Hruska Commission "[i]n recognition of the problems faced by the federal courts of appeals." Hruska Commission Report, 67 F.R.D. at 207. Congress assigned the Hruska Commission to, *inter alia*, "'report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of

the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.'" *Id.* at 208.

Regarding oral argument, the Hruska Commission "recognize[d] the importance of safeguarding the right to oral argument in all cases where it is appropriate." *Id.* at 254. As the Hruska Commission explained, "[o]ral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written communication." *Id.* at 254-55.

The Hruska Commission noted that in order to safeguard the right to oral argument in appropriate cases, "[s]tandards for the grant or denial of oral argument . . . [should be] dealt with through the rule-making process." *Id.* at 255. Underlying this recommendation was a concern regarding "[t]he extent to which the opportunity to present oral argument is denied litigants in a number of the circuits." *Id.* Importantly, the Hruska Commission recognized that, "[t]o mandate oral argument in every case would clearly be unwarranted; neither is it appropriate to ignore the risks to the process of appellate adjudication inherent in too-ready a denial of the opportunity orally to present a litigant's cause." *Id.*

The policy choice in favor of oral argument in appropriate cases made by the Hruska Commission and implemented in the 1979 amendment to Rule 34 continues to garner support. For example, a report of the Federal Judicial Center in a study of case screening and the reduction in oral arguments in four federal courts of appeals (hereinafter "Federal Judicial Center Report") notes that:

> [t]he critical feature of a nonargument process is the means by which a single judge can reject a case from the nonargument calendar and have it placed before a panel of judges for oral argument. It is the rejection process that ensures that each case receives the attention thought appropriate by the most cautious judge on the panel.

Joe S. Cecil & Donna Stienstra, Fed. Judicial Ctr., *Deciding Cases Without Argument: An Examination of Four Courts of*

Appeals, 161 (1987). Moreover, the importance of the proper utilization of oral argument is recognized by judges and academics alike. *See, e.g.*, Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 38 (1986) ("The argument gives the court, with all the panel members participating, an opportunity to test ideas and to discuss problems about the case with counsel. The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result."); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 280 (1996) ("The marked decrease in argument, therefore, necessarily reduces the quality of decision making.").

D. Violation Of Rule 34(a)(2) Is Recognized By Judges And Academics As A Significant Problem Existing Across The Courts Of Appeals

Despite the plain language of Rule 34(a)(2) protecting the right to oral argument in federal appeals, courts of appeals continue to deny oral argument in contravention of the rule. This is clear in a number of appeals, similar to Miller's, where the panel denied oral argument despite the dissenting judge explicitly stating a desire for oral argument. *See, e.g.*, *Gravatt v. Paul Revere Life Ins. Co.*, No. 02-17028, 2004 WL 1257716, at *6 (9th Cir. 2004) (Wallace, J., dissenting) ("In our rush to limit our time on the bench, a party may have suffered a reversal when twenty minutes of oral argument could have satisfied a majority that this outcome is unwarranted"); *United States v. Lambert*, 963 F.2d 711, 719 (5th Cir. 1992) (Wisdom, J., concurring and dissenting) ("This case deserved oral argument before our panel . . . ."); *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982) (Wood, J., dissenting) ("I respectfully dissent because I am concerned about this case sliding by us under Fed. R. App. P. 34 dispensing with oral argument after it was disposed of on motions in the district court.").

Moreover, a number of judges and academics have publicly recognized the erosion of Rule 34(a)(2), whether it be due to increasing caseloads, collegial norms, or a devaluation of oral argument. For example, one academic

wrote that "[t]he promise in Federal Rule of Appellate Procedure 34 . . . has been rendered rather Orwellian by the circuit judges' collective response to the caseload crisis . . . to what amounts to a de facto presumption that most appeals can be decided without oral argument." Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 923 (1995). The Federal Judicial Center Report contained a second possible cause for the erosion of Rule 34(a)(2): "[s]everal [courts of appeals] judges expressed concern that awareness of the preferences of other panel members for nonargument in a case may cause their colleagues to become reluctant to state a preference for argument." Cecil, *supra*, at 161-62. As a final example, Sixth Circuit Judge Merritt wrote: "[people] can speculate on their own about how well each court of appeals is doing in complying with the presumption favoring oral argument found in Rule 34 . . . and whether the performance of each is consistent with the appropriate standards of visibility, accountability and care. My own view is that many circuits have unwisely devalued oral argument and left themselves open to valid criticism." Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio St. L. J. 1385, 1388 (1990).

While the magnitude the of erosion of Rule 34(a)(2) has yet to be quantified, the rate of oral argument in the courts of appeals continues to fall.[3] This decline is especially troublesome given that underlying the Hruska Commission's oral argument recommendation was a concern regarding "[t]he extent to which the opportunity to present oral argument is denied litigants in a number of the circuits." Hruska Commission Report, 67 F.R.D. at 255.

---

[3] *See*, e.g., Judicial Facts and Figures, Table 2.2, http://www.uscourts.gov/judicialfactsfigures/Table202.pdf. (excluding the Federal Circuit, the percentage of cases in the courts of appeals terminated on the merits after oral hearing (versus after submission on briefs) has declined from 45% in 1990 to 30% in 2005).

II. THE SEVENTH CIRCUIT ERRONEOUSLY DENIED MILLER ANY FORM OF RELIEF IN CONFLICT WITH SIXTH CIRCUIT AUTHORITY THAT DICTATES A NEW TRIAL AND 28 U.S.C. § 2255, WHICH MANDATES, AT A MINIMUM, AN EVIDENTIARY HEARING

A. The Divided Panel Of The Seventh Circuit's Decision Conflicts With Sixth Circuit Authority That Dictates A New Trial On The Same Claim And Similar Facts

As the dissenting member of the divided panel of the Seventh Circuit noted, in "truncat[ing] the usual appellate procedures" in violation of Rule 34(a)(2), the divided panel summarily affirmed and adopted the opinion of the district court notwithstanding the fact that "the discussion of the issue on appeal by the district court [cannot] be said to be totally responsive to the presentation of [Miller] in [the Seventh Circuit]." (App. 18a.) In fact, Miller's argument in the Seventh Circuit by appointed counsel included Sixth Circuit authority dictating a new trial under similar facts that Miller did not raise in the district court when he was forced to proceed *pro se* from prison. *See Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004). Importantly, the divided panel's decision now stands in direct conflict with this Sixth Circuit authority.

In *Clinkscale*, a prisoner brought a habeas petition in which he claimed, *inter alia*, that his trial attorneys' failure to file a timely notice of alibi constituted ineffective assistance in violation of the Sixth Amendment. *See Clinkscale*, 375 F.3d at 435; *see generally Strickland v. Washington*, 466 U.S. 668, 687 (1984) (providing the familiar two-part test for ineffective assistance of counsel claims: "counsel's performance was deficient" and "the deficient performance prejudiced the defense"). The Sixth Circuit reversed the district court's denial of the habeas petition and granted a new trial. *See Clinkscale*, 375 F.3d at 446. The court held that the attorneys' representation was objectively unreasonable under *Strickland*'s deficiency prong because:

"[a]t least where–as here–alibi is a critical aspect of a defendant's defense, there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense." *Id.* at 443. The Sixth Circuit also held that the attorneys' representation prejudiced Clinkscale's defense. *Id.* at 444. The court noted that "no legal authority has been identified–and we are aware of none–specifically requiring that a defendant claiming ineffectiveness of counsel based on the failure to file a timely alibi notice must produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony." *Id.* It also explained that, in any event, Clinkscale had in fact submitted an affidavit from his father, and the record contained other evidence "that provides some indication of the facts" to which his father, his close friend, and his girlfriend "might have testified if called as alibi witnesses." *Id.* Finally, the Court reasoned that "because the central focus of Clinkscale's trial was the identity of the perpetrator, the evidence essentially boiled down to a credibility contest . . . . Under these circumstances, Clinkscale's inability to provide any supporting testimony for his strongest defense must be considered especially damaging and prejudicial." *Id.* at 445.

While the Sixth Circuit granted Clinkscale a new trial, and Miller's appeal involves the same claim and similar facts, the divided panel of the Seventh Circuit summarily affirmed and denied Miller any form of relief. As in *Clinkscale*, Miller brought an ineffective assistance of counsel claim because his attorneys failed to, *inter alia*, timely provide notice of three alibi witnesses. Also, as in *Clinkscale*, the record makes clear that Miller's attorneys provided objectively unreasonable representation because, *inter alia*, their failure to timely provide notice of the alibi witnesses led to the exclusion of the witnesses' alibi testimony. (R. 113 at 3:3-6:6; R. 118 at 72:17-23.) Finally, as in *Clinkscale*, Miller provided sufficient evidence that this failure prejudiced his alibi defense.

Record evidence establishes the identity of Miller's three alibi witnesses, that the witnesses appeared in court to testify on Miller's behalf, and that the witnesses would have

provided valuable alibi testimony that Miller was out of town on the day in question:

- *Jacqueline Pollard*, Miller's mother, and *Princess Jordan*, Miller's former girlfriend, both arrived at court to testify as alibi witnesses on Miller's behalf but were excluded due to the notice failure. (R. 113 at 5:16-6:6.) According to a formerly sealed motion for subpoenas, which Magistrate Judge Crocker granted, Pollard and Jordan "will testify that, while not actually with the defendant at the specific time of the alleged sale in Madison, they had seen him in Chicago on May 10, 2001, as well as throughout the week of May 7, 2001." (R. 47 at 1-2.) The government confirmed this fact when it argued for the alibi witnesses' exclusion. The government stated that from the investigator interview notes Miller's attorney faxed to it, "it does appear Princess Jordan and [Jacqueline] Pollard may have had something to say to him about seeing Mr. Miller on or about this date of May 10th." (R. 113 at 4:16-22.)

- *Sheneka Ware*, Miller's sister, testified at the trial. But, when she began answering that she had personal knowledge of whether Miller went out of town on May 6 or 7, 2001, the government objected based upon the notice of alibi ruling and the court sustained the objection. (R. 118 at 72:17-23.)

As in *Clinkscale*, this record evidence "provides some indication of the facts" to which Miller's mother, former girlfriend, and sister "might have testified if called as alibi witnesses."[4] *See Clinkscale*, 375 F.3d at 444.

---

[4] In the four affidavits Miller submitted in the district court as part of his § 2255 proceedings, his attorneys admitted to their ineffective assistance and alibi witnesses Pollard and Ware elaborated on the substance of their proposed alibi testimony contained in the record. (R. 148; R. 150; R. 151; R. 152.) The district court denied the affidavits as untimely, and ruled in the alternative that the affidavits would not change the outcome of its denial of Miller's § 2255 petition. (App. 29a.) Counsel challenged both rulings in Miller's briefs before the divided panel.

The prejudice Miller suffered from the exclusion of this alibi witness testimony is even more evident when one examines the lack of concrete evidence connecting Miller to the drug sales. The government did not arrest Miller on site, make any electronic recordings of the deals despite contemporaneous police surveillance, or present any fingerprints linking Miller to the deals on the drugs or marked money. Moreover, the identification evidence presented by the government was thin and upon proper challenge with a reasonably presented alibi defense, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. First, the identification testimony offered by Gonzalez is questionable given, *inter alia*, the fact that his identification of Miller on May 10, 2001, was made from a photograph array that contained eleven photographs, all of which were of Miller. (R. 39 at 25:22-26:11, 31:4-14.) Moreover, Gonzalez shredded the notes upon which he made his May 10, 2001 police reports based upon a "personal" policy. (R. 113 at 29:11-30:20.) Second, considerable credibility issues are also present with respect to the testimony of Winfield, Miller's former co-defendant, including, *inter alia*, the fact that Winfield received substantial benefits from the government for his testimony and the fact that Winfield reviewed the police reports describing Gonzalez's version of the events prior to testifying at trial. (*Id.* at 71:22-72:13, 73:18-74:23.)

At bottom, as in *Clinkscale*, "because the central focus of [Miller's] trial was the identity of the perpetrator, the evidence essentially boiled down to a credibility contest . . . . Under these circumstances, [Miller's] inability to provide any supporting testimony for his strongest defense must be considered especially damaging and prejudicial." *Id.* at 445. Under the holdings of *Clinkscale*, Miller should receive a new trial. At a minimum, therefore, Miller should receive an evidentiary hearing. The divided panel's failure to grant such relief is inherently contrary to the Sixth Circuit's decision in *Clinkscale* and, as set forth below, is in direct conflict with 28 U.S.C. § 2255.

B. The Divided Panel Of The Seventh Circuit's Decision Conflicts With The Standard For An Evidentiary Hearing Mandated By 28 U.S.C. § 2255

The divided panel of the Seventh Circuit's summary affirmation and adoption of the district court's opinion fails to directly address counsel's appellate challenge to the district court's denial of an evidentiary hearing. Yet, Miller's allegations of ineffective assistance of counsel and supporting evidence do not "conclusively show that [Miller] is entitled to no relief." 28 U.S.C. § 2255. The record contains sufficient evidence of the excluded alibi testimony from the witnesses, that if believed by the trier of fact, places Miller out of town on the day in question. Such circumstances, at a minimum, warrant an evidentiary hearing. *See Machibroda v. United States*, 368 U.S. 487, 496 (1962) (holding that the district court should have granted an evidentiary hearing because while the "factual assertions of the petitioner [were] improbable . . . [i]f the allegations are true, the petitioner is clearly entitled to relief"); *Koskela v. United States*, 235 F.3d 1148, 1149-50 (8th Cir. 2001) (holding that the district court abused its discretion in finding an evidentiary hearing unnecessary where the record contained conflicting evidence regarding counsel's decision not to present alibi witnesses which arguably lacked credibility); *see generally Clinkscale*, 375 F.3d at 444 n.9 (finding state's argument that defendant's father "'only barely provide[s] an alibi for [defendant]' because '[defendant] could certainly have driven from Columbus to Youngstown in the hours between the shooting and the time his father allegedly saw him that morning'" unavailing and merely a credibility issue ultimately for the jury).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TODD A. FRANKEL
Counsel of Record
ANDREW J. JARZYNA
THOUFIQ A. KUTTY
LINDSAY WILSON GOWIN
333 West Wacker Drive,
Suite 2100
Chicago, IL 60606
(312) 407-0700

November 6, 2006

APPENDIX

TABLE OF CONTENTS

Order of the United States Court of Appeals for the Seventh Circuit, *Miller v. United States*, No. 05-1616 (June 1, 2006) 1a

Opinion and Order of the United States District Court for the Western District of Wisconsin, *United States v. Miller*, Nos. 04-C-0527-C and 01-CR-0071-C-02 (Dec. 29, 2004) 19a

Order of the United States District Court for the Western District of Wisconsin, *United States v. Miller*, Nos. 04-C-0527-C and 01-CR-0071-C-02 (Mar. 8, 2005) 31a

Order of the United States Court of Appeals for the Seventh Circuit, *Miller v. United States*, No. 05-1616 (Aug. 8, 2006) 32a

UNPUBLISHED ORDER

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 1, 2006

No. 05-1616

STACEY MILLER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 04 C 527
Barbara B. Crabb, *Chief Judge*

[Filed June 1, 2006]

Before: BAUER, POSNER, and RIPPLE, Circuit Judges.

ORDER

Judge William J. Bauer and Judge Richard A. Posner summarily AFFIRM and adopt as their own the attached opinion and order of the district court dated December 29, 2004, and the orders dated March 8, 2005. Judge Kenneth F. Ripple's dissent is also attached.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-0527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Dec. 29, 2004]
[Filed Dec. 30, 2004]

OPINION AND ORDER

Defendant Stacey Miller's motion, filed pursuant to 28 U.S.C. § 2255, is before the court following the completion of briefing on the motion. When defendant filed the motion, he set out 31 grounds in support of his motion. (The grounds are numbered 1 through 32, but there is no # 20.) I dismissed # 32 because it relates to defendant's contention that the court sentenced him unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). I held that it was premature to raise this claim because the United States Supreme Court has not decided whether the holding in *Blakely* applies to federal cases. *See* Aug. 5, 2004 Order, dkt. # 139. The remaining 30 claims are summarized as follows:

1. Defendant was denied a fair trial when police officer Twing pressured his subordinate, Gonzales [sic], to make a false identification of defendant.

2. Defendant was denied a fair trial when officer Twing showed Gonzales [sic] a second single person photo array (after he had failed to identify defendant from an earlier array) that was impermissibly suggestive and substantively unreliable.

3. The government engaged in prosecutorial misconduct when it failed to preserve the police notes of officer Twing and produce them upon request.

4. The government engaged in prosecutorial misconduct when it failed to produce surveillance photos, notes and reports concerning defendant's co-defendant Mark Winfield's apartment showing his daily visitors.

5. The government coerced Winfield into fabricating testimony depicting defendant as a drug dealer.

6. The government's prosecution of defendant was undertaken in retaliation for his refusal to become a police informant and his petitioning the police to cease their harassment of him.

7. The court denied defendant a fair trial by failing to grant him a third continuance when his backup counsel was not prepared to represent him.

8. The court denied defendant equal protection when it refused to grant a third continuance in a situation in which it would have give [sic] a Caucasian defendant a continuance.

9. The court denied defendant a fair trial when it refused to hold a photo lineup to give him an opportunity to show that Gonzales [sic] had misidentified him.

10. The government denied defendant a fair trial when it knowingly elicited false testimony from its witnesses.

11. The government interfered with defendant's right to present witnesses favorable to him by intimidating his witnesses with threats of prosecution for perjury if they testified falsely.

12. The court denied defendant his right to effective counsel when it failed either to grant a continuance or to appoint counsel that would have been prepared for trial.

13. The government engaged in misconduct when it used Fed. R. Evid. 404(b) evidence against defendant after having waived its right to do so at the October pretrial conference.

14. The government engaged in misconduct when it failed to divulge witness Twing's penchant for testifying falsely about things defendant never told him.

15. The government deprived defendant of a fair trial when it used its examinations of witnesses and closing statement to intimate that defendant had fabricated his alibi witness testimony.

16. The court denied defendant his rights under the confrontation clause when it refused to grant defense counsel a continuance to prepare for her cross-examination of the government's witnesses.

17. The court denied defendant his right to present a defense when it refused to permit three additional alibi witnesses to testify because defense counsel had failed to identify them in the time allotted to him.

18. The court denied him his right to testify in his own behalf when it refused to give his defense counsel time to consult with defendant to develop his strategy for his defense.

19. The government's failure to divulge the fact that the cocaine base contained over 75% unusable material was a violation of *Brady*.

20. [omitted by defendant].

21. The court violated its obligations under Fed. R. Crim. P. 32 when it did not give detailed findings regarding defendant's objections to the drug quantities for which he was held responsible under the sentencing guidelines.

22. The government did not meet its burden of proof on defendant's relevant conduct.

23. The government's failure to meet its burden of proof on defendant's relevant conduct was a violation of *Apprendi*.

24. The court misinterpreted the sentencing guidelines when it enhanced defendant's sentence for conduct uncharged in the indictment.

25. The court violated U.S.S.G. § 3C1.1 when it enhanced defendant's sentence for obstruction of justice after finding that defendant had tried to present untruthful alibi witnesses.

26. Defendant's counsel failed to subpoena police and civilian records to prove that the case against him was fabricated in retaliation for his refusal to become an informant.

27. Defendant's trial counsel gave defendant ineffective assistance and deprived him of a fair trial.

28. Defendant's trial counsel gave him ineffective assistance at sentencing when she failed to call witnesses who could testify about the makeup of the cocaine base.

29. Defendant's appellate counsel was ineffective in failing to investigate or raise legally significant issues and to keep defendant informed of the status of the appeal.

30. The court violated defendant's right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony.

31. The government failed to seek a reduction in defendant's sentence under Fed. R. Crim. P. 35 or U.S.S.G. § 5K1.1 as it had promised.

I conclude that defendant cannot proceed on any of these claims. Some are barred because he raised them on his direct appeal; some are barred because he could have raised them on direct appeal and chose not to; and the majority are barred because defendant has not supported them with specific evidence but has merely set out conclusory and self-serving allegations.

BACKGROUND

Defendant was charged in an indictment returned on June 28, 2001, with one count of distributing five grams or more of cocaine base with co-defendant Mark Winfield and one count of distributing five grams or more of cocaine base himself. The court appointed James Cooley to represent defendant and set a trial date for November 19, 2001.

On September 27, 2001, the government filed an alibi notice demand pursuant to Fed. R. Crim. P. 12.1. Defendant filed certain pretrial motions, including one to suppress any in-court identification of him by the undercover police officer and another to bar the government from using the out-of-court identifications. He filed his notice of alibi on October 10, 2001, naming Carleton Higgins as an alibi witness; on November 5, 2001, he filed an amended notice, naming Robert Morgan as another alibi witness and said that both witnesses would confirm that he was in Chicago, Illinois between 3:00 and 5:00 p.m. on May 10, 2001, when the critical drug transaction was occurring in Madison, Wisconsin.

On November 19, 2001, with prospective jurors in the courthouse, Cooley advised the court that he was too ill to proceed with the case on that date. The trial was set over to December 10, 2001. On December 4, counsel asked for another postponement, which was granted on the condition that Cooley arrange for backup counsel who would be prepared to go forward with defendant's representation if Cooley became ill again.

Trial was set to begin on January 28, 2002. Backup counsel Krista Ralston appeared on defendant's behalf to say that Cooley was ill again and that she did not believe she was adequately prepared to handle the trial in his stead. The court denied the motion for a third continuance; the trial went forward with Ralston representing defendant. At the end of the second day of trial, the jury returned a verdict of guilty and found that defendant had been responsible for the distribution of more than five grams of cocaine base.

The evidence at trial included testimony from co-defendant Mark Winfield, who described his involvement with defendant in the distribution of crack cocaine; police officer Bernard Gonzales [sic], who had spent long periods of time with defendant while operating in an undercover capacity; police officer Jeff Twing, the case manager for the investigation of defendant, who testified about his surveillance of defendant during drug buys by Gonzales [sic] and, on rebuttal, about his interview of defendant's alibi witness, Robert Morgan; and two representatives of wireless phone companies, who testified about calls made on cell

phones to numbers used by defendant and his co-defendant. Defendant called as witnesses his sister, Sheneka Ware; Joseph Bryan, who testified that while he was in the Dane County jail, he heard Mark Winfield tell defendant that Winfield was going to tell the truth and testify that defendant was not at the house when the drug deal took place, but that he was going to wait until the government offered him a plea bargain; and alibi witness Robert Morgan, who testified that he had seen defendant in Chicago at defendant's mother's house in the morning and afternoon on May 10, 2001 and again the next morning.

Defendant was sentenced on April 12, 2002. His criminal category was VI. With more than 5 grams of cocaine as proved conduct and an upward adjustment for obstruction of justice (presenting a false alibi), his offense level was 38 and his guideline range was 360 months to life. (Without any enhancement for obstruction of justice, defendant would have had an offense level of 37 as a career offender and a guideline range of 360 months to life.) He was sentenced to 400 months. He filed a timely notice of appeal on April 26, 2002, arguing that the denial of his request for a third continuance was a denial of his right to a fair trial. Originally, he raised the question of the ineffectiveness of counsel; at oral argument, he decided to save the issue for his post-conviction motion. The court of appeals affirmed his conviction, finding that the denial of the motion for a third continuance was not an abuse of discretion and not a denial of defendant's right to a fair trial.

OPINION

Section 2255 motions are not intended to be substitutes for direct appeals or as a means of appealing the same issues a second time. As a general rule, they are to be used only for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect that results in a complete miscarriage of justice. *Reed v. Farley*, 512 U.S. 339, 353-54 (1994). They cannot be used for issues that were raised on direct appeal in the absence of changed circumstances, for non-constitutional issues that could have been raised on direct appeal but were not or for constitutional issues that were not raised on direct appeal, unless the movant can establish cause for the default

as well as actual prejudice from the failure to appeal. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996).

Defendant's claims numbered 7, 12, 16 and 18 are all aspects of his contention that he should not have been denied his request for a third continuance. Defendant raised this issue on direct appeal and it was decided against him. He cannot reargue it in this motion. He raises a variant of this claim (# 8), alleging that the court would not have denied the continuance had he been Caucasian. It is arguable that he could not have raised this claim on direct appeal because its determination would rest on evidence that would not be part of the trial record. However, it is unnecessary to decide whether he should be able to raise it on this motion because he has no evidence to support the claim. He merely alleges that the court gives different treatment to members of different races. He does not set forth any facts that would support his allegation. Mere speculation does not warrant relief or even an evidentiary hearing. *Galbraith v. United States*, 313 F.3d 1001 (7th Cir. 2002) (in order to show need for evidentiary hearing, § 2255 movant must file detailed and specific affidavit showing he has actual proof of allegations he is making).

Defendant's claims 1, 2 and 9 relate to alleged deficiencies in the procedure used to identify him. Defendant had a full evidentiary hearing on these issues but never raised them on direct appeal. He has suggested no reason why he could not have raised them, other than to say that his appointed appellate counsel did not listen to him. This statement falls short of establishing cause for the default, even if he could establish that the identification process deprived him of a constitutional right.

Claims 3, 4, 5, 6, 10, 11, 13 and 14 relate to defendant's allegations that "the government" engaged in various forms of misconduct. None of these allegations are supported by any evidence or even any specific allegations so as to trigger a need for an evidentiary hearing. As I have noted, mere unsupported assertions are not sufficient to require an evidentiary hearing. *Galbraith*, 313 F.3d at 1001. As to claim # 5, moreover, which relates to alleged governmental coercion of co-defendant Winfield to testify falsely, defendant's counsel cross-examined Winfield at depth about

his reasons for testifying, including his hope that he would get a shorter sentence in return for testifying against defendant.

Defendant's claim # 15 is that the government deprived him of a fair trial when it used its examinations of witnesses and its closing statement to intimate that defendant had fabricated his alibi witness testimony. The government's statements were well within the bounds of propriety. It is permissible for a prosecutor to cross-examine alibi witnesses and then to argue that they are not believable because of discrepancies in their testimony or, as in the case of defendant's alibi witness, because of his admission that if defendant had asked him to lie, he would not admit that fact under oath.

In claim # 17, defendant alleges that he was denied a fair trial when the court refused to permit three additional alibi witnesses to testify because trial counsel had failed to identify them. Defendant could have raised this claim on direct appeal. He does not explain why he did not. Thus, even if it were a potential constitutional violation to be deprived of the testimony of witnesses he wanted, rather than a matter of interpretation of a rule of procedure, defendant has not shown the necessary cause and prejudice he must show if he wishes to raise this issue in his § 2255 motion.

Defendant's claims numbered 19, 21, 22, 23, 24, 25 and 30 relate to his sentencing. As a general rule, challenges to sentencing issues cannot be raised in a motion pursuant to § 2255. *Scott v. United States*, 997 F.2d 340 (7th Cir. 1993). Rarely does a dispute over the application of the guidelines implicate a jurisdictional or constitutional error of law or constitute a fundamental defect resulting in a complete miscarriage of justice. Certainly, the issues that defendant has raised do not rise to that level[.] In claim # 19, for example, defendant challenges the government's failure to divulge the non-usable part of the cocaine base for which he was held responsible. Not only is this not a constitutional issue, it is not even an issue under the guidelines, which provide that the weight of a controlled substance set forth in the sentencing guidelines tables includes the "entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1, Notes to

Drug Quantity Table (A). Defendant may think that he has a right to be sentenced only for the actual amount of controlled substance he possessed but the sentencing commission does not agree. Therefore, even if the government had been required to advise defendant of the composition of the mixture, its failure to do so did not change anything for defendant. He would still have been sentenced on the basis of the entire weight of the mixture containing the crack cocaine.

Defendant's other sentencing claims require little comment, particularly in light of the fact that defendant conceded before sentencing that he had a guideline level of 37, a criminal history of VI and a guideline imprisonment range of 360 months to life. It was not a misinterpretation of the guidelines to enhance defendant's sentence for conduct that had not been charged (# 24) because the guidelines give the courts specific authority to consider relevant uncharged conduct. It was not error for the court to omit specific findings on drug amounts when defendant's co-defendant had stipulated to the amount for which defendant was held accountable (# 21). Even if it was error, defendant would not be entitled to a shorter sentence because his career offender status put him in level 37, with or without the drug amounts. The same conclusion applies to defendant's assertions that the government did not meet its burden of proof on his relevant conduct (# 22) and that the court violated the guidelines in enhancing his sentence for obstruction of justice (# 25). As to defendant's assertion that the government violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the jury found beyond a reasonable doubt that defendant had been responsible for the distribution of more than five grams of cocaine, thus removing any question of compliance with *Apprendi*. *Apprendi* requires jury findings only when the finding would affect the *statutory* maximum applicable to a defendant, not to the sentencing guideline level that could be applied.

As to defendant's last sentencing claim, # 30, that the court violated his right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony, defendant has a right to present alibi witnesses but no right to present false testimony from those witnesses. Giving him a sentence enhancement for

suborning perjury is no more a violation of his rights than giving him an enhancement for giving perjured testimony himself. *United States v. Dunnigan*, 507 U.S. 87 (1993) (holding that potential enhancement of sentence for testifying falsely is not violation of defendant's right to testify).

Defendant's claims 26-29 relate to his assertion that both his trial counsel and his appellate counsel were ineffective as a matter of law. Claim # 28 relates to the makeup of the cocaine base; because the composition of the cocaine base is irrelevant in sentencing, as explained above, it was not ineffective assistance for defendant's trial counsel to fail to call witnesses to testify on this issue. The other three claims are unsupported by any specific assertions. Defendant has not filed an affidavit setting forth with precision exactly what his counsel did or failed to do that made a difference in the outcome of the proceedings. He asserts that his trial counsel failed to develop proof of the government's retaliatory motive against him but he has not met his burden of showing what form that proof would have taken. *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003).

To establish ineffectiveness of counsel, defendant must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. *Massaro v. United States*, 538 U.S. 500, 505 (2003). The presumption is that defense counsel has rendered adequate assistance and exercised her reasonable professional judgment in making decisions about trial strategy. Defendant has not made the necessary showing that his counsel made errors so serious that she was not functioning as the counsel guaranteed him under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 680, 688 (1984). Although he asserts that trial counsel failed to subpoena helpful witnesses for the trial and for the sentencing, he has not provided sufficiently precise information of what those witnesses would have contributed to the proceedings. *Hardamon*, 319 F.3d at 951.

Finally, in claim # 30, defendant contends that the government failed to seek the reduction of defendant's sentence that it had promised him for his substantial assistance. The simple contention that the government failed

to carry out its promise of a sentencing recommendation is not one that defendant can pursue on a motion for post-conviction relief. "A defendant has no constitutionally protected right to a downward departure based on alleged substantial assistance to the government." *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994). Because the defendant has no right to a departure, the court cannot require the government to file a motion for a reduced sentence under either U.S.S.G. § 5K1.1 or Fed. R. Crim. P. 35(b). An exception exists if the defendant can show that the government's refusal to act is motivated by an unconstitutional reason such as racial discrimination. The government's power is "subject to constitutional limitations that district courts can enforce." *Wade v. United States*, 504 U.S. 181, 185 (1992). However, "'the burden is on the defendant to make a substantial threshold showing [of unconstitutional motive] before he becomes entitled to an evidentiary hearing on the matter.'" *United States v. Carter*, 122 F.3d 469, 476 (7th Cir. 1997) (quoting *Kelly*, 14 F.3d at 1177-78). Defendant has made no showing that unconstitutional motives tainted the government's decision to withdraw its motion for a sentencing reduction.

One additional matter remains. On December 13, 2004, long after the time for briefing had expired, defendant filed a request for submission of certain affidavits in support of his § 2255 motion. The request will be denied for untimeliness, but the affidavits would have not have changed the outcome of this motion. The affidavits of Krista Ralston and James Cooley are insufficient to show that defendant received constitutionally ineffective representation; the affidavits of defendant's friend Jacqueline Pollard and his sister Sheneka Davis are not specific and are based in large part on hearsay. Defendant's own affidavit focuses on his appellate counsel and his alleged deficiencies but says only that he asked counsel to raise the obstruction of justice enhancement, the drug quantity determination, the lack of a prior identification procedure and "the deficiencies in the indictment." (Defendant has never alleged that the indictment was deficient in any respect and he does not explain in his affidavit what these deficiencies might be.) As I have explained, neither the obstruction of justice enhancement nor the drug quantity determination are matters that can be raised

in a § 2255 motion, even if defendant could show cause for the failure to raise them on direct appeal. In any event, neither determination would entitled [sic] defendant to a shorter sentence, even if he could show that they were erroneous. As for the lack of a prior identification procedure, defendant had a full opportunity to develop this challenge prior to trial; it is not surprising that his appellate counsel would not think it was worth raising on appeal. Defendant has failed to explain what he thinks his appellate counsel could have done differently or how the outcome of his appeal would have changed had counsel challenged the identification procedure.

ORDER

IT IS ORDERED that defendant Stacey Miller's motion for vacation or reduction of his sentence brought pursuant to 28 U.S.C. § 2255 is DENIED in all respects. FURTHER, IT IS ORDERED that defendant's motion to submit untimely affidavits in support of his motion is DENIED.

Entered this 29th day of December, 2004.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Mar. 8, 2005]
[Filed Mar. 9, 2005]

ORDER

The order entered in this case on December 29, 2004, is amended in the following respect: At the beginning of the last paragraph on page 14, the number 30 is deleted and the number 31 is inserted therefor.

In all other respects, the order remains as entered on December 29, 2004.

Entered this 8th day of March, 2005.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Mar. 8, 2005]
[Filed Mar. 9, 2005]

ORDER

Defendant Stacey Miller has filed a "Petition for a Certificate of Appealability." He has not filed a notice of appeal from the judgment entered in this case on December 30, 2004, although the time for filing such a notice expired on March 1, 2005, the date on which he filed this petition. Despite the lack of a notice of appeal, I will decide the motion for a certificate of appealability, which defendant must have if he is to appeal the denial of his motion for post conviction relief brought pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Such a certificate shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2).

Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that "are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

In his request for a certificate of appealability, defendant has identified two issues he wants to appeal. I am prepared to issue a certificate of appealability with respect to one of the two issues.

First, defendant contends that trial counsel gave him ineffective assistance. This contention relates to claims numbered 26-29 in his motion. In deciding the motion as to those claims, I found that petitioner had failed to support his allegations with specific details about his counsel's deficiencies. Although I believe that defendant failed to show his entitlement to relief under § 2255 because of his counsel's alleged constitutional deficiencies, I cannot say that a reasonable judge would not make a different decision. Therefore, I will issue a certificate of appealability as to the claims numbered 26-29 in defendant's motion.

Second, defendant contends that the court erred in denying his claim that he was sentenced unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In an order dated August 5, 2004, I told defendant that it was premature to raise the claim because the United States Supreme Court had not decided whether the holding in *Blakely* applied to federal cases. For this reason, I did not order the government to respond to this claim. It was unnecessary to discuss the claim again in the December 29 order because the Supreme Court had not yet decided *Booker* when I denied petitioner's motion for post conviction relief. Defendant is not entitled to a certificate of appealability on this issue. He has no basis on which to raise a claim under *Blakely* or *Booker*. On January 12, 2005, the Supreme Court rendered its opinion in *United States v. Booker*, 04-104 (U.S. Jan. 12, 2005). It held that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases the maximum punishment. The Court held also that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts that are not the product of factfinding by a jury but that the guidelines are not unconstitutional if judges use them for advisory purposes. The Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application. Unfortunately for defendant, on February 2,

2005, the Court of Appeals for the Seventh Circuit resolved the retroactivity uncertainty, at least for motions filed in this circuit asserting the right newly recognized in *Booker*. In *McReynolds v. United States*, 397 F.3d 479 (7th Cir. 2005), the court held that the rights recognized in *Booker* do not apply retroactively on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Id.* at 4 (quoting *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004)). The court concluded that *Booker* did not establish a "watershed rule"; "the choice between judges and juries as factfinders does not make such a fundamental difference." *Id.* The court was persuaded that the *Booker* decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being "the degree of flexibility judges would enjoy in applying the guideline system." *Id.* Now that the court of appeals has decided that *Booker* has no retroactive application, defendant cannot succeed in showing that he is entitled to a modification of his sentence based upon that decision. Because this issue is not debatable among reasonable jurists, a court could not resolve the issues differently and the question is not adequate to deserve encouragement to proceed further, I decline to issue a certificate of appealability.

ORDER

IT IS ORDERED that defendant Stacey Miller's request for a certificate of appealability is GRANTED as to his ineffective assistance of counsel claim and DENIED as to his claim premised on *Blakely v. Washington*.

Entered this 8th day of March, 2005.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

RIPPLE, *Circuit Judge*, dissenting. In my view, summary affirmance on the basis of a memorandum order issued by the district court should be reserved for the most extraordinary of situations. This principle is especially true when the decision of this court is not the product of the usual processes of decision-making, but of a preliminary screening. Before we truncate the usual appellate procedures, at a minimum, the appeal ought to be facially frivolous, or the writing of the district court should be so extensive that it fairly can be said to be responsive to all the arguments made by the appellant in this court. In any event, our basis of decision should be clear to the Supreme Court of the United States when it reviews our decision if a petition for certiorari is filed.

In the case before us, the appeal cannot be considered facially frivolous. Indeed, both parties have submitted extensive and thoughtful briefs. Nor can the discussion of the issue on appeal by the district court be said to be totally responsive to the presentation of the appellant in this court. Finally, our order in this case, adopting the order of the district court, does not fulfill our obligation to provide the Supreme Court with an adequate explanation of our decision.

Accordingly, I respectfully dissent from the order issued by the court today. I would set this case for oral argument in due course.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-0527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Dec. 29, 2004]
[Filed Dec. 30, 2004]

OPINION AND ORDER

Defendant Stacey Miller's motion, filed pursuant to 28 U.S.C. § 2255, is before the court following the completion of briefing on the motion. When defendant filed the motion, he set out 31 grounds in support of his motion. (The grounds are numbered 1 through 32, but there is no # 20.) I dismissed # 32 because it relates to defendant's contention that the court sentenced him unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). I held that it was premature to raise this claim because the United States Supreme Court has not decided whether the holding in *Blakely* applies to federal cases. *See* Aug. 5, 2004 Order, dkt. # 139. The remaining 30 claims are summarized as follows:

1. Defendant was denied a fair trial when police officer Twing pressured his subordinate, Gonzales [sic], to make a false identification of defendant.

2. Defendant was denied a fair trial when officer Twing showed Gonzales [sic] a second single person photo array (after he had failed to identify defendant from an earlier array) that was impermissibly suggestive and substantively unreliable.

3. The government engaged in prosecutorial misconduct when it failed to preserve the police notes of officer Twing and produce them upon request.

4. The government engaged in prosecutorial misconduct when it failed to produce surveillance photos, notes and reports concerning defendant's co-defendant Mark Winfield's apartment showing his daily visitors.

5. The government coerced Winfield into fabricating testimony depicting defendant as a drug dealer.

6. The government's prosecution of defendant was undertaken in retaliation for his refusal to become a police informant and his petitioning the police to cease their harassment of him.

7. The court denied defendant a fair trial by failing to grant him a third continuance when his backup counsel was not prepared to represent him.

8. The court denied defendant equal protection when it refused to grant a third continuance in a situation in which it would have give [sic] a Caucasian defendant a continuance.

9. The court denied defendant a fair trial when it refused to hold a photo lineup to give him an opportunity to show that Gonzales [sic] had misidentified him.

10. The government denied defendant a fair trial when it knowingly elicited false testimony from its witnesses.

11. The government interfered with defendant's right to present witnesses favorable to him by intimidating his witnesses with threats of prosecution for perjury if they testified falsely.

12. The court denied defendant his right to effective counsel when it failed either to grant a continuance or to appoint counsel that would have been prepared for trial.

13. The government engaged in misconduct when it used Fed. R. Evid. 404(b) evidence against defendant after having waived its right to do so at the October pretrial conference.

14. The government engaged in misconduct when it failed to divulge witness Twing's penchant for testifying falsely about things defendant never told him.

15. The government deprived defendant of a fair trial when it used its examinations of witnesses and closing statement to intimate that defendant had fabricated his alibi witness testimony.

16. The court denied defendant his rights under the confrontation clause when it refused to grant defense counsel a continuance to prepare for her cross-examination of the government's witnesses.

17. The court denied defendant his right to present a defense when it refused to permit three additional alibi witnesses to testify because defense counsel had failed to identify them in the time allotted to him.

18. The court denied him his right to testify in his own behalf when it refused to give his defense counsel time to consult with defendant to develop his strategy for his defense.

19. The government's failure to divulge the fact that the cocaine base contained over 75% unusable material was a violation of *Brady*.

20. [omitted by defendant].

21. The court violated its obligations under Fed. R. Crim. P. 32 when it did not give detailed findings regarding defendant's objections to the drug quantities for which he was held responsible under the sentencing guidelines.

22. The government did not meet its burden of proof on defendant's relevant conduct.

23. The government's failure to meet its burden of proof on defendant's relevant conduct was a violation of *Apprendi*.

24. The court misinterpreted the sentencing guidelines when it enhanced defendant's sentence for conduct uncharged in the indictment.

25. The court violated U.S.S.G. § 3C1.1 when it enhanced defendant's sentence for obstruction of justice after finding that defendant had tried to present untruthful alibi witnesses.

26. Defendant's counsel failed to subpoena police and civilian records to prove that the case against him was fabricated in retaliation for his refusal to become an informant.

27. Defendant's trial counsel gave defendant ineffective assistance and deprived him of a fair trial.

28. Defendant's trial counsel gave him ineffective assistance at sentencing when she failed to call witnesses who could testify about the makeup of the cocaine base.

29. Defendant's appellate counsel was ineffective in failing to investigate or raise legally significant issues and to keep defendant informed of the status of the appeal.

30. The court violated defendant's right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony.

31. The government failed to seek a reduction in defendant's sentence under Fed. R. Crim. P. 35 or U.S.S.G. § 5K1.1 as it had promised.

I conclude that defendant cannot proceed on any of these claims. Some are barred because he raised them on his direct appeal; some are barred because he could have raised them on direct appeal and chose not to; and the majority are barred because defendant has not supported them with specific evidence but has merely set out conclusory and self-serving allegations.

BACKGROUND

Defendant was charged in an indictment returned on June 28, 2001, with one count of distributing five grams or more of cocaine base with co-defendant Mark Winfield and one count of distributing five grams or more of cocaine base himself. The court appointed James Cooley to represent defendant and set a trial date for November 19, 2001.

On September 27, 2001, the government filed an alibi notice demand pursuant to Fed. R. Crim. P. 12.1. Defendant filed certain pretrial motions, including one to suppress any in-court identification of him by the undercover police officer and another to bar the government from using the out-of-court identifications. He filed his notice of alibi on October 10, 2001, naming Carleton Higgins as an alibi witness; on November 5, 2001, he filed an amended notice, naming Robert Morgan as another alibi witness and said that both witnesses would confirm that he was in Chicago, Illinois between 3:00 and 5:00 p.m. on May 10, 2001, when the critical drug transaction was occurring in Madison, Wisconsin.

On November 19, 2001, with prospective jurors in the courthouse, Cooley advised the court that he was too ill to proceed with the case on that date. The trial was set over to December 10, 2001. On December 4, counsel asked for another postponement, which was granted on the condition that Cooley arrange for backup counsel who would be prepared to go forward with defendant's representation if Cooley became ill again.

Trial was set to begin on January 28, 2002. Backup counsel Krista Ralston appeared on defendant's behalf to say that Cooley was ill again and that she did not believe she was adequately prepared to handle the trial in his stead. The court denied the motion for a third continuance; the trial went forward with Ralston representing defendant. At the end of the second day of trial, the jury returned a verdict of guilty and found that defendant had been responsible for the distribution of more than five grams of cocaine base.

The evidence at trial included testimony from co-defendant Mark Winfield, who described his involvement with defendant in the distribution of crack cocaine; police officer Bernard Gonzales [sic], who had spent long periods of time with defendant while operating in an undercover capacity; police officer Jeff Twing, the case manager for the investigation of defendant, who testified about his surveillance of defendant during drug buys by Gonzales [sic] and, on rebuttal, about his interview of defendant's alibi witness, Robert Morgan; and two representatives of wireless phone companies, who testified about calls made on cell

phones to numbers used by defendant and his co-defendant. Defendant called as witnesses his sister, Sheneka Ware; Joseph Bryan, who testified that while he was in the Dane County jail, he heard Mark Winfield tell defendant that Winfield was going to tell the truth and testify that defendant was not at the house when the drug deal took place, but that he was going to wait until the government offered him a plea bargain; and alibi witness Robert Morgan, who testified that he had seen defendant in Chicago at defendant's mother's house in the morning and afternoon on May 10, 2001 and again the next morning.

Defendant was sentenced on April 12, 2002. His criminal category was VI. With more than 5 grams of cocaine as proved conduct and an upward adjustment for obstruction of justice (presenting a false alibi), his offense level was 38 and his guideline range was 360 months to life. (Without any enhancement for obstruction of justice, defendant would have had an offense level of 37 as a career offender and a guideline range of 360 months to life.) He was sentenced to 400 months. He filed a timely notice of appeal on April 26, 2002, arguing that the denial of his request for a third continuance was a denial of his right to a fair trial. Originally, he raised the question of the ineffectiveness of counsel; at oral argument, he decided to save the issue for his post-conviction motion. The court of appeals affirmed his conviction, finding that the denial of the motion for a third continuance was not an abuse of discretion and not a denial of defendant's right to a fair trial.

OPINION

Section 2255 motions are not intended to be substitutes for direct appeals or as a means of appealing the same issues a second time. As a general rule, they are to be used only for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect that results in a complete miscarriage of justice. *Reed v. Farley*, 512 U.S. 339, 353-54 (1994). They cannot be used for issues that were raised on direct appeal in the absence of changed circumstances, for non-constitutional issues that could have been raised on direct appeal but were not or for constitutional issues that were not raised on direct appeal, unless the movant can establish cause for the default

as well as actual prejudice from the failure to appeal. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996).

Defendant's claims numbered 7, 12, 16 and 18 are all aspects of his contention that he should not have been denied his request for a third continuance. Defendant raised this issue on direct appeal and it was decided against him. He cannot reargue it in this motion. He raises a variant of this claim (# 8), alleging that the court would not have denied the continuance had he been Caucasian. It is arguable that he could not have raised this claim on direct appeal because its determination would rest on evidence that would not be part of the trial record. However, it is unnecessary to decide whether he should be able to raise it on this motion because he has no evidence to support the claim. He merely alleges that the court gives different treatment to members of different races. He does not set forth any facts that would support his allegation. Mere speculation does not warrant relief or even an evidentiary hearing. *Galbraith v. United States*, 313 F.3d 1001 (7th Cir. 2002) (in order to show need for evidentiary hearing, § 2255 movant must file detailed and specific affidavit showing he has actual proof of allegations he is making).

Defendant's claims 1, 2 and 9 relate to alleged deficiencies in the procedure used to identify him. Defendant had a full evidentiary hearing on these issues but never raised them on direct appeal. He has suggested no reason why he could not have raised them, other than to say that his appointed appellate counsel did not listen to him. This statement falls short of establishing cause for the default, even if he could establish that the identification process deprived him of a constitutional right.

Claims 3, 4, 5, 6, 10, 11, 13 and 14 relate to defendant's allegations that "the government" engaged in various forms of misconduct. None of these allegations are supported by any evidence or even any specific allegations so as to trigger a need for an evidentiary hearing. As I have noted, mere unsupported assertions are not sufficient to require an evidentiary hearing. *Galbraith*, 313 F.3d at 1001. As to claim # 5, moreover, which relates to alleged governmental coercion of co-defendant Winfield to testify falsely, defendant's counsel cross-examined Winfield at depth about

his reasons for testifying, including his hope that he would get a shorter sentence in return for testifying against defendant.

Defendant's claim # 15 is that the government deprived him of a fair trial when it used its examinations of witnesses and its closing statement to intimate that defendant had fabricated his alibi witness testimony. The government's statements were well within the bounds of propriety. It is permissible for a prosecutor to cross-examine alibi witnesses and then to argue that they are not believable because of discrepancies in their testimony or, as in the case of defendant's alibi witness, because of his admission that if defendant had asked him to lie, he would not admit that fact under oath.

In claim # 17, defendant alleges that he was denied a fair trial when the court refused to permit three additional alibi witnesses to testify because trial counsel had failed to identify them. Defendant could have raised this claim on direct appeal. He does not explain why he did not. Thus, even if it were a potential constitutional violation to be deprived of the testimony of witnesses he wanted, rather than a matter of interpretation of a rule of procedure, defendant has not shown the necessary cause and prejudice he must show if he wishes to raise this issue in his § 2255 motion.

Defendant's claims numbered 19, 21, 22, 23, 24, 25 and 30 relate to his sentencing. As a general rule, challenges to sentencing issues cannot be raised in a motion pursuant to § 2255. *Scott v. United States*, 997 F.2d 340 (7th Cir. 1993). Rarely does a dispute over the application of the guidelines implicate a jurisdictional or constitutional error of law or constitute a fundamental defect resulting in a complete miscarriage of justice. Certainly, the issues that defendant has raised do not rise to that level[.] In claim # 19, for example, defendant challenges the government's failure to divulge the non-usable part of the cocaine base for which he was held responsible. Not only is this not a constitutional issue, it is not even an issue under the guidelines, which provide that the weight of a controlled substance set forth in the sentencing guidelines tables includes the "entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1, Notes to

Drug Quantity Table (A). Defendant may think that he has a right to be sentenced only for the actual amount of controlled substance he possessed but the sentencing commission does not agree. Therefore, even if the government had been required to advise defendant of the composition of the mixture, its failure to do so did not change anything for defendant. He would still have been sentenced on the basis of the entire weight of the mixture containing the crack cocaine.

Defendant's other sentencing claims require little comment, particularly in light of the fact that defendant conceded before sentencing that he had a guideline level of 37, a criminal history of VI and a guideline imprisonment range of 360 months to life. It was not a misinterpretation of the guidelines to enhance defendant's sentence for conduct that had not been charged (# 24) because the guidelines give the courts specific authority to consider relevant uncharged conduct. It was not error for the court to omit specific findings on drug amounts when defendant's co-defendant had stipulated to the amount for which defendant was held accountable (# 21). Even if it was error, defendant would not be entitled to a shorter sentence because his career offender status put him in level 37, with or without the drug amounts. The same conclusion applies to defendant's assertions that the government did not meet its burden of proof on his relevant conduct (# 22) and that the court violated the guidelines in enhancing his sentence for obstruction of justice (# 25). As to defendant's assertion that the government violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the jury found beyond a reasonable doubt that defendant had been responsible for the distribution of more than five grams of cocaine, thus removing any question of compliance with *Apprendi*. *Apprendi* requires jury findings only when the finding would affect the *statutory* maximum applicable to a defendant, not to the sentencing guideline level that could be applied.

As to defendant's last sentencing claim, # 30, that the court violated his right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony, defendant has a right to present alibi witnesses but no right to present false testimony from those witnesses. Giving him a sentence enhancement for

suborning perjury is no more a violation of his rights than giving him an enhancement for giving perjured testimony himself. *United States v. Dunnigan*, 507 U.S. 87 (1993) (holding that potential enhancement of sentence for testifying falsely is not violation of defendant's right to testify).

Defendant's claims 26-29 relate to his assertion that both his trial counsel and his appellate counsel were ineffective as a matter of law. Claim # 28 relates to the makeup of the cocaine base; because the composition of the cocaine base is irrelevant in sentencing, as explained above, it was not ineffective assistance for defendant's trial counsel to fail to call witnesses to testify on this issue. The other three claims are unsupported by any specific assertions. Defendant has not filed an affidavit setting forth with precision exactly what his counsel did or failed to do that made a difference in the outcome of the proceedings. He asserts that his trial counsel failed to develop proof of the government's retaliatory motive against him but he has not met his burden of showing what form that proof would have taken. *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003).

To establish ineffectiveness of counsel, defendant must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. *Massaro v. United States*, 538 U.S. 500, 505 (2003). The presumption is that defense counsel has rendered adequate assistance and exercised her reasonable professional judgment in making decisions about trial strategy. Defendant has not made the necessary showing that his counsel made errors so serious that she was not functioning as the counsel guaranteed him under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 680, 688 (1984). Although he asserts that trial counsel failed to subpoena helpful witnesses for the trial and for the sentencing, he has not provided sufficiently precise information of what those witnesses would have contributed to the proceedings. *Hardamon*, 319 F.3d at 951.

Finally, in claim # 30, defendant contends that the government failed to seek the reduction of defendant's sentence that it had promised him for his substantial assistance. The simple contention that the government failed

to carry out its promise of a sentencing recommendation is not one that defendant can pursue on a motion for post-conviction relief. "A defendant has no constitutionally protected right to a downward departure based on alleged substantial assistance to the government." *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994). Because the defendant has no right to a departure, the court cannot require the government to file a motion for a reduced sentence under either U.S.S.G. § 5K1.1 or Fed. R. Crim. P. 35(b). An exception exists if the defendant can show that the government's refusal to act is motivated by an unconstitutional reason such as racial discrimination. The government's power is "subject to constitutional limitations that district courts can enforce." *Wade v. United States*, 504 U.S. 181, 185 (1992). However, "'the burden is on the defendant to make a substantial threshold showing [of unconstitutional motive] before he becomes entitled to an evidentiary hearing on the matter.'" *United States v. Carter*, 122 F.3d 469, 476 (7th Cir. 1997) (quoting *Kelly*, 14 F.3d at 1177-78). Defendant has made no showing that unconstitutional motives tainted the government's decision to withdraw its motion for a sentencing reduction.

One additional matter remains. On December 13, 2004, long after the time for briefing had expired, defendant filed a request for submission of certain affidavits in support of his § 2255 motion. The request will be denied for untimeliness, but the affidavits would have not have changed the outcome of this motion. The affidavits of Krista Ralston and James Cooley are insufficient to show that defendant received constitutionally ineffective representation; the affidavits of defendant's friend Jacqueline Pollard and his sister Sheneka Davis are not specific and are based in large part on hearsay. Defendant's own affidavit focuses on his appellate counsel and his alleged deficiencies but says only that he asked counsel to raise the obstruction of justice enhancement, the drug quantity determination, the lack of a prior identification procedure and "the deficiencies in the indictment." (Defendant has never alleged that the indictment was deficient in any respect and he does not explain in his affidavit what these deficiencies might be.) As I have explained, neither the obstruction of justice enhancement nor the drug quantity determination are matters that can be raised

in a § 2255 motion, even if defendant could show cause for the failure to raise them on direct appeal. In any event, neither determination would entitled [sic] defendant to a shorter sentence, even if he could show that they were erroneous. As for the lack of a prior identification procedure, defendant had a full opportunity to develop this challenge prior to trial; it is not surprising that his appellate counsel would not think it was worth raising on appeal. Defendant has failed to explain what he thinks his appellate counsel could have done differently or how the outcome of his appeal would have changed had counsel challenged the identification procedure.

ORDER

IT IS ORDERED that defendant Stacey Miller's motion for vacation or reduction of his sentence brought pursuant to 28 U.S.C. § 2255 is DENIED in all respects. FURTHER, IT IS ORDERED that defendant's motion to submit untimely affidavits in support of his motion is DENIED.

Entered this 29th day of December, 2004.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Mar. 8, 2005]
[Filed Mar. 9, 2005]

ORDER

The order entered in this case on December 29, 2004, is amended in the following respect: At the beginning of the last paragraph on page 14, the number 30 is deleted and the number 31 is inserted therefor.

In all other respects, the order remains as entered on December 29, 2004.

Entered this 8th day of March, 2005.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 8, 2006

No. 05-1616

STACEY MILLER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 04 C 527
Barbara B. Crabb, *Chief Judge*

[Filed Aug. 8, 2006]

Before: BAUER, POSNER, and RIPPLE, Circuit Judges.

ORDER

On consideration of the petition for rehearing or rehearing *en banc* filed in the above-captioned case by petitioner-appellant on July 17, 2006, all of the judges on the original panel have voted to DENY the petition for rehearing and no judge in active service has requested a vote on the petition for rehearing *en banc*.[1] Accordingly, the petition for rehearing or rehearing *en banc* is DENIED.

---

[1] Chief Judge Joel M. Flaum and Judge Ilana Diamond Rovner took no part in the consideration of this case.

5

No. 06-643

FILED
FEB 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

STACEY MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

1. Whether the court of appeals' panel was required by Federal Rule of Appellate Procedure 34(a)(2) to hold oral argument.

2. Whether petitioner was entitled to relief on his collateral challenge under 28 U.S.C. 2255 based on his claim that trial counsel rendered constitutionally ineffective assistance by failing to name three additional witnesses on his notice of alibi.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Calderon v. *Coleman*, 525 U.S. 141 (1998) 6
Clinkscale v. *Carter*, 375 F.3d 430 (6th Cir. 2004), cert. denied, 543 U.S. 1177 (2005) 8
Montana v. *Hall*, 481 U.S. 400 (1987) 6
Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993) 6
Strickland v. *Washington*, 466 U.S. 668 (1984) 7
United States v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) 6
United States v. *Miller*, 327 F.3d 598 (7th Cir. 2003) 2, 3, 7, 9
United States v. *Watts*, 519 U.S. 148 (1997) 6

Statutes and rules:

21 U.S.C. 841(a)(1) 2
28 U.S.C. 2255 ..... 2, 3, 7
Fed. R. App. P.:
Rule 34(a)(2) 4, 5
Rule 34(a)(2)(A)-(C) 5

Rules—Continued: Page

Fed. R. Crim. P. 12.1(a) 3
7th Cir. R.:
Rule 32.1(b) 5
Rule 32.1(d) 5

In the Supreme Court of the United States

No. 06-643

STACEY MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not published in the *Federal Reporter* but is reprinted in 183 Fed. Appx. 571. The opinion and order of the district court (Pet. App. 19a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2006. A petition for rehearing was denied on August 8, 2006 (Pet. App. 32a). The petition for a writ of certiorari was filed on November 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on two counts of distributing more than five

grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 400 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. *United States* v. *Miller*, 327 F.3d 598 (7th Cir. 2003). In July 2004, petitioner filed a motion for post-conviction relief pursuant to 28 U.S.C. 2255. Gov't C.A. Br. 6. The district court denied relief, Pet. App. 19a-30a, and the court of appeals affirmed, *id.* at 1a-18a.

1. a. In May 2001, police officers in Madison, Wisconsin, arranged a series of undercover drug buys from Mark Winfield, a suspected drug dealer. On May 7, 2001, an undercover officer met petitioner while purchasing crack cocaine from Winfield at Winfield's apartment. On May 10, 2001, the officer again arranged to purchase crack cocaine from Winfield, and Winfield told the officer to go to Winfield's apartment to complete the transaction. When the officer arrived at Winfield's apartment, petitioner was present, and petitioner sold the drugs to the officer. Later that day, the officer made an additional drug purchase from petitioner at Winfield's apartment. *Miller*, 327 F.3d at 599; Gov't C.A. Br. 13-14.

Petitioner was charged with two counts of distributing five or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1).[1] Before trial, petitioner's counsel gave notice that two witnesses would testify as alibi witnesses, and that both witnesses would testify that petitioner was in Chicago, Illinois, on the afternoon of May 10, 2001, when the drug purchases from petitioner took place. One of the named alibi witnesses failed to show

---

[1] Winfield was also charged with drug offenses but pleaded guilty before trial. *Miller*, 327 F.3d at 600.

up at trial. During the trial, the district court barred petitioner from calling three additional alibi witnesses because those witnesses had not been named on the notice of alibi, see Fed. R. Crim. P. 12.1(a). *Miller*, 327 F.3d at 602; Gov't C.A. Br. 4-5.

b. The court of appeals affirmed petitioner's convictions. *Miller*, 327 F.3d at 598-605. Petitioner argued that the district court should have granted him a further continuance because his replacement trial counsel, who took over his case when his initial counsel fell ill, needed additional time to prepare for trial. *Id.* at 600-602, 604. Petitioner contended that, if he had been granted an additional continuance, his replacement counsel could have corrected the notice of alibi and presented the three additional alibi witnesses. *Id.* at 602. In rejecting petitioner's argument, the court of appeals found that the "additional alibi witnesses would not have produced a different result." *Id.* at 605; see *id.* at 602 (concluding that it was "unlikely that additional alibi witnesses would have produced a different result in [petitioner's] trial"). The court also observed that the jury had "heard testimony from more than one government witness regarding [petitioner's] intention to produce false alibi witnesses," and that it was unclear whether the additional alibi testimony "would have been admissible or even favorable to [petitioner]." *Ibid.*

2. a. In July 2004, petitioner filed a collateral challenge to his conviction pursuant to 28 U.S.C. 2255. Gov't C.A. Br. 6. Petitioner argued, *inter alia*, that his trial counsel had rendered ineffective assistance, including by failing to subpoena favorable witnesses. Pet. App. 28a.

The district court denied petitioner's Section 2255 motion. Pet. App. 19a-30a. With respect to petitioner's claim that his trial counsel was ineffective in failing to

subpoena favorable witnesses, the court found that petitioner had "not provided sufficiently precise information of what those witnesses would have contributed to the proceedings." *Id.* at 28a. The court also denied as untimely petitioner's motion to submit affidavits from two of the three additional alibi witnesses whose testimony petitioner had unsuccessfully sought to present at trial. The court noted that the affidavits, even if timely, "would not have changed the outcome of [the Section 2255] motion," and that the affidavits were "not specific and [were] based in large part on hearsay." *Id.* at 29a.

b. The court of appeals affirmed in an unpublished order that adopted the district court's opinion. Pet. App. 1a-18a. Judge Ripple dissented from the court's decision to resolve the appeal in a summary order. He believed that the appeal was not "facially frivolous" and that the court's summary order failed to provide "an adequate explanation of [the court's] decision." *Id.* at 18a. Judge Ripple stated that he would have "set [the] case for oral argument in due course." *Ibid.*

c. Petitioner sought rehearing and rehearing en banc, arguing, *inter alia*, that the court was required to hold oral argument in his case because Judge Ripple had stated that he would have set the case for argument. Pet. for Reh'g 8-9. Petitioner relied on Federal Rule of Appellate Procedure 34(a)(2), which states that "[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary" for certain specified reasons.[2] The court of appeals de-

[2] The specified reasons are that "the appeal is frivolous," the "dispositive issue or issues have been authoritatively decided," or that "the facts and legal arguments are adequately presented in the briefs,

nied petitioner's motion for rehearing or rehearing en banc, observing that the original panel (including Judge Ripple) had unanimously voted to deny panel rehearing, and that no judge had requested a vote on the petition for rehearing en banc. Pet. App. 32a.

ARGUMENT

1. Petitioner renews his contention (Pet. 9-14) that the court of appeals was required to hold oral argument before resolving his appeal. That contention does not warrant review.

Federal Rule of Appellate Procedure 34(a)(2) states that "[o]ral argument must be allowed * * * unless a panel of three judges * * * unanimously agrees that oral argument is unnecessary." Petitioner contends that that rule was violated in this case. Review of that case-specific issue is not warranted, particularly in the circumstances of this case. The court of appeals' unpublished summary order does not establish circuit precedent on the application of Rule 34(a)(2). See 7th Cir. R. 32.1(b) and (d). And although Judge Ripple remarked in his dissent that he would have set the case for oral argument, the focus of his dissent was not on the question of whether oral argument should (or must) be held, but instead was on the question of whether the case was suitable for a summary affirmance of the district court's opinion without any further analysis or explanation by the court of appeals. See Pet. App. 18a.

Remanding the case for the court of appeals to reconsider whether to hold oral argument would serve no cognizable purpose. Although petitioner argued in his petition for rehearing that the panel was required by Rule

---

and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(A)-(C).

34(a)(2) to hold oral argument, the panel—including Judge Ripple—voted unanimously to deny rehearing, and no judge voted in favor of en banc review. Accordingly, even the dissenting judge on the panel evidently is now of the view that oral argument need not be held, or at least would serve no constructive purpose. This Court need not grant review to superintend the court of appeals' application of the oral-argument rule in those specific circumstances. Cf. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[3]

This Court's review of whether the court of appeals should hold oral argument is especially unwarranted given that, as explained below, pp. 6-9, *infra*, petitioner's underlying claim is plainly lacking in merit.

2. Petitioner contends (Pet. 15-19) that trial counsel rendered ineffective assistance by failing to provide timely notice of three additional alibi witnesses. That fact-bound claim lacks merit and does not warrant review.

---

[3] The brief of the Amici Former Judges extols the virtues of oral argument on appellate decision-making, including in this Court (Br. 10-11)—a general proposition that cannot be disputed. Yet, this Court not infrequently issues summary reversals over the dissents of Justices who would set the cases for briefing and argument and who criticized the failure to do so. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 170-171 (1997) (per curiam) (Kennedy, J., dissenting); *Montana* v. *Hall*, 481 U.S. 400, 405-410 (1987) (per curiam) (Marshall, J., dissenting); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270-272, 275 (1982) (per curiam) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). Indeed, and contrary to amici (Br. 10), such summary reversals have been issued over the dissents of four members of the Court. See *Calderon* v. *Coleman*, 525 U.S. 141, 147-152 (1998) (per curiam) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

As an initial matter, petitioner could not establish prejudice in connection with his claim of ineffective assistance. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). In his direct appeal, in denying petitioner's claim that his trial counsel should have been granted an additional continuance, the court of appeals rejected petitioner's argument that the denial of a continuance prejudiced him by depriving him of the opportunity to call the three additional alibi witnesses. The court applied the same prejudice standard that would apply to petitioner's ineffective assistance claim, *i.e.*, whether, if the additional alibi witnesses had testified, there was "a reasonable probability of a different outcome at trial." *Miller*, 327 F.3d at 602; see *Strickland*, 466 U.S. at 694. The court found that the "additional alibi witnesses would not have produced a different result." *Miller*, 327 F.3d at 605; see *id.* at 602 ("find[ing] it unlikely that additional alibi witnesses would have produced a different result in [petitioner's] trial"). The same conclusion equally applies to petitioner's ineffective-assistance claim.[4]

Petitioner also could not demonstrate that his counsel rendered deficient performance by failing to include the three additional witnesses in the notice of alibi. Trial counsel interviewed and investigated all of the potential alibi witnesses, including the three additional witnesses that petitioner now contends should have been included in the notice of alibi. Gov't C.A. Br. 28-29. While having investigated those potential alibi wit-

---

[4] In the district court proceedings on petitioner's Section 2255 motion, petitioner sought to submit affidavits from two of the potential alibi witnesses. The district court rejected those affidavits as untimely, however, and further explained that the affidavits in any event would not affect the court's decision to deny petitioner relief. Pet. App. 29a.

nesses, trial counsel elected in the notice of alibi to include only two other witnesses, both of which lacked the sort of close personal relationship with petitioner that could have afforded grounds for impeachment. The circumstances indicate that counsel's decision was a tactical judgment concerning which witnesses were most persuasive and least vulnerable to impeachment. See *id.* at 28-30.

Contrary to petitioner's argument (Pet. 15-18), the court of appeals' denial of his ineffective-assistance claim does not conflict with the Sixth Circuit's decision in *Clinkscale* v. *Carter*, 375 F.3d 430 (2004), cert. denied, 543 U.S. 1177 (2005). In that case, the court held that trial counsel's failure to file a notice of alibi witnesses constituted ineffective assistance. *Id.* at 443-445. In *Clinkscale*, unlike here, counsel failed entirely to file a notice of alibi witnesses, thus resulting in "wholesale exclusion of the defense" apart from the defendant's own testimony. *Id.* at 443. Petitioner's trial lawyer, by contrast, included two alibi witnesses in his notice of alibi, had interviewed the additional potential alibi witnesses, and had chosen not to amend his notice of alibi to add them. Gov't C.A. Br. 28-30. In *Clinkscale*, moreover, the Sixth Circuit determined that the alibi testimony would have given rise to a reasonable probability of a different result because it would have corroborated the defendant's own testimony and because the prosecution's identification testimony was "highly suspect." 375 F.3d at 444-445. Here, by contrast, the court of appeals determined in petitioner's direct appeal that the additional alibi witnesses would not have affected the result at trial, and the court also noted that the jury heard tes-

timony to the effect that petitioner "inten[ded] to produce false alibi witnesses." *Miller*, 327 F.3d at 602, 605.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

LOUIS M. FISCHER
Attorney

FEBRUARY 2007

---

[5] There is no merit to petitioner's fact-bound contention (Pet. 19) that the district court was required to hold an evidentiary hearing. The district court explained that petitioner had failed to "provide[] sufficiently precise information of what [the] witnesses would have contributed to the proceedings," and ruled that the affidavits submitted by petitioner were untimely and would not have changed the court's decision. Pet. App. 28a-29a.

FILED
FEB 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(b)

No. 06-643

IN THE
Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

TODD A. FRANKEL
Counsel of Record
ANDREW J. JARZYNA
THOUFIQ A. KUTTY
AMY M. GARDNER
333 West Wacker Drive,
Suite 2100
Chicago, IL 60606
(312) 407-0700

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

I. THE SEVENTH CIRCUIT'S VIOLATION OF RULE 34(a)(2) WARRANTS REVIEW 2

II. THE CONFLICT WITH SIXTH CIRCUIT AUTHORITY IS RIPE FOR REVIEW 4

A. The Government Cannot Distinguish *Clinkscale* on *Strickland* Attorney Performance Grounds 4

B. The Government Cannot Distinguish *Clinkscale* on *Strickland* Prejudice Grounds 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Anderer v. Jones,
412 F.3d 794 (7th Cir. 2005) 3

Anderson v. Butler,
858 F.2d 16 (1st Cir. 1988) 10

Clinkscale v. Carter,
375 F.3d 430 (6th Cir. 2004) ..... *passim*

Davis v. Lambert,
388 F.3d 1052 (7th Cir. 2004) 8

Harris v. Reed,
894 F.2d 871 (7th Cir. 1990) 5, 10

Kimmelman v. Morrison,
477 U.S. 365 (1986) 5

Massaro v. United States,
538 U.S. 500 (2003) 9

McConville v. SEC,
No. 05-3510, 2007 U.S. App. LEXIS 926
(7th Cir. Jan. 17, 2007) (order) 3

Ortega-Rodriguez v. United States,
507 U.S. 234 (1993) 3

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 5

Stewart v. Wolfenbarger,
468 F.3d 338 (6th Cir. 2006) 4, 6, 7, 10

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

United States v. Miller,
327 F.3d 598 (7th Cir. 2003) 8, 9

Wiggins v. Smith,
539 U.S. 510 (2003) 9

Williams v. Taylor,
529 U.S. 362 (2000) 9

STATUTES

28 U.S.C. § 2255 8-10

FEDERAL RULES OF PROCEDURE

Fed. R. App. P. 34(a)(2) 1-3, 10

Fed. R. Crim. P. 12.1 4

REPLY BRIEF FOR THE PETITIONER

The government does not and cannot deny that the Seventh Circuit violated Rule 34(a)(2) of the Federal Rules of Appellate Procedure by refusing to hold oral argument. Instead, the government attempts to minimize the significance of the Rule violation. (Opp. 5-6.) The government's position, however, is inconsistent with the policy choices made by Congress in enacting the Rule (Pet. 11-13), and with the widely accepted principle that oral argument is an invaluable part of the appellate process as demonstrated by the broad range of *amicus* support for the Petition by former judges of the United States Courts of Appeals, innocence projects, and a prominent bar association. Moreover, the government's Opposition neither mentions nor distinguishes the authority cited by Miller in his Petition that the Rule violation constitutes a deprivation of procedural due process. (Pet. 9-11.) Of note, the government takes this position while, at the same time, admitting that "the virtues of oral argument on appellate decision-making . . . cannot be disputed." (Opp. 6 n.3.)

The benefits of oral argument, and in particular the opportunity to enhance the appellate court's decision-making, were needed in Miller's case. When the Seventh Circuit denied Miller oral argument in violation of Rule 34(a)(2), and summarily affirmed and adopted the opinion of the district court over Judge Ripple's dissent, the panel majority disregarded on point authority from the Sixth Circuit that dictates a new trial on the same claim and similar facts. *See Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004). Indeed, it was not until the government filed its Opposition before this Court that Miller's arguments regarding *Clinkscale* were addressed for the first time. The government's inability to meaningfully distinguish this authority exposes the inequity that results from the erosion of Rule 34(a)(2), and underscores the need for this Court to grant the Petition.

I. THE SEVENTH CIRCUIT'S VIOLATION OF RULE 34(a)(2) WARRANTS REVIEW

The government's attempts to downplay the significance of the Seventh Circuit's violation of Rule 34(a)(2) are fundamentally flawed.

The government's first argument, that the "court of appeals' unpublished summary order does not establish circuit precedent on the application of Rule 34(a)(2)," is immaterial due to the nature of the Rule violation at issue. (Opp. 5.) The decision being challenged was not the subject of the parties' briefing before the Seventh Circuit, as is likely often the case with respect to the application of a rule that concerns the inner workings of an appellate court. Moreover, because "the Rule does not require a vote open to public scrutiny . . . violations are only exposed through the rare circumstance of a judge's written dissent, as occurred here." (Brief of Former Judges of the United States Courts of Appeals as *Amici Curiae* in Support of Petitioner, at 12 (filed Jan. 31, 2007).) Thus, contrary to the government's basic contention, this case presents a rare opportunity for this Court to exercise its supervisory power and address a growing problem across the circuits. (*See* Pet. 13-14 (discussing the magnitude of Rule 34(a)(2) violations); *see also* Brief of *Amicus Curiae* Northwestern University's Center on Wrongful Convictions and Other Innocence Projects in Support of Petitioner, at 15-16 (filed Feb. 7, 2007) (discussing how federal courts of appeals are denying oral argument with increasing frequency, particularly on collateral review).)

The government's contention that "the focus of [Judge Ripple's] dissent was not on the question of whether oral argument should (or must) be held" is simply inaccurate. (Opp. 5.) The summation of Judge Ripple's entire dissent was that he "would set this case for oral argument in due course." (Pet. App. 18a.)

Next, the government asserts that "[r]emanding this case for the court of appeals to reconsider whether to hold oral argument would serve no cognizable purpose" because no judges voted in favor of rehearing or rehearing en banc.

(Opp. 5.) As part of this argument, the government states that "even the dissenting judge on the panel is evidently now of the view that oral argument need not be held, or at least would serve no constructive purpose."[1] (Opp. 6.) This argument also lacks merit.

As an initial matter, the government's argument ignores this Court's power to ensure that the Seventh Circuit properly follows Rule 34(a)(2). Moreover, the government's hypothesis concerning Judge Ripple's vote on rehearing or rehearing en banc is pure speculation, and it ignores the fact that Judge Ripple did not amend his dissent in response to Petitioner's Rule 34(a)(2) argument, a convention panels including Judge Ripple have previously employed in other appeals. *See McConville v. SEC*, No. 05-3510, U.S. App. LEXIS 926, at 1 (7th Cir. Jan. 17, 2007) (order) ("On consideration of the petition for rehearing, the slip opinion issued . . . is hereby amended . . . ."); *Anderer v. Jones*, 412 F.3d 794, 794 (7th Cir. 2005) ("In response to [a petition for rehearing and rehearing en banc], the panel amends its opinion . . . .").

At bottom, the Seventh Circuit's failure to ensure compliance with Rule 34(a)(2) on rehearing or rehearing en banc demonstrates "either deficiencies in [the Seventh Circuit's] internal operating procedures or a failure to recognize the importance of complying with the Rule 34(a)(2) unanimity mandate." (Brief of *Amicus Curiae* Chicago

---

[1] The authority the government cites in support of its attempt to diminish the significance of the Rule 34(a)(2) violation, *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993), is irrelevant. That case does not address Rule 34 or oral argument. Similarly, the government's citation to a handful of cases in a footnote in response to the amicus brief by former judges of the federal courts of appeals, for the proposition that "this Court not infrequently issues summary reversals over the dissents of Justices who would set the cases for briefing and argument," also misses the point. The government's cases do nothing to take away from the respect that this Court generally exhibits for the rights of judges in the minority and oral argument. Moreover, this Court does not have an equivalent to Rule 34(a)(2) instituted by Congress and the Federal Judiciary requiring it to defer to a minority judge's desire for oral argument.

Coun[illegible]of Lawyers in Support of Petitioner, at 9 (filed Feb. 7, 2007)). "Either way, this case, which involves substantial liberty interests, presents an ideal opportunity to remind both the Seventh Circuit, and the courts of appeals as a whole, that oral argument is an important part of the appellate process that *cannot* be dispensed with unless the panel hearing the case unanimously agrees." (*Id.* (emphasis in original).)

II. THE CONFLICT WITH SIXTH CIRCUIT AUTHORITY IS RIPE FOR REVIEW

The government's attempts to distinguish *Clinkscale* in its Opposition, often through attacks on the merits of Miller's ineffective assistance of counsel claim, are unconvincing.

A. The Government Cannot Distinguish *Clinkscale* on *Strickland* Attorney Performance Grounds

The government first endeavors to distinguish *Clinkscale* by arguing that "[i]n *Clinkscale*, unlike here, counsel failed entirely to file a notice of alibi witnesses," whereas in Miller's case, counsel "had chosen not to amend his notice of alibi to add [the three witnesses]." (Opp. 8.) This argument is contrary to the record of both cases.

To begin, the government's argument rests upon its erroneous assertion that Clinkscale's counsel "failed entirely to file a notice of alibi." (Opp. 8.) As stated in *Clinkscale*, "after the jury was empanelled, Clinkscale's trial attorneys filed a written notice of alibi and identified [three witnesses] as potential alibi witnesses," but the trial judge refused to allow the alibi testimony "because the notice of alibi was not filed seven days prior to trial, as required by Rule 12.1." *Clinkscale*, 375 F.3d at 434-35. Thus, *Clinkscale* actually turned on the failure by counsel to comply with applicable notice of alibi law, resulting in the exclusion of alibi witnesses. *See Stewart v. Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006) ("An objectively reasonable attorney would have complied with Michigan law in providing the correct alibi notice. This is especially true because Petitioner's entire defense rested upon alibi." (citing *Clinkscale*, 375 F.3d at 443)).

The government's argument also fails because it incorrectly relies upon the notion that Miller's trial counsel made a strategic decision to "include[] two alibi witnesses in his notice of alibi" and "not to amend his notice of alibi to add [the three other witnesses]." (Opp. 8; *see id.* (raising the same argument regarding the merits: "[t]he circumstances indicate that counsel's decision was a tactical judgment concerning which witnesses were most persuasive and least vulnerable to impeachment").) This position fails for three reasons.

First, the government's argument as to alibi witnesses Pollard and Jordan is unsuccessful because it is a *post hoc* rationalization of Cooley's performance that is unsupported by the record. *See Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." (citing *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986))). Despite the government's claim that "counsel's decision was a tactical judgment concerning which witnesses were most persuasive and least vulnerable to impeachment" (Opp. 8), the record contains ample evidence through Cooley's motion for issuance of trial subpoenas that Cooley intended to call Pollard and Jordan to provide alibi testimony: "Pollard and Jordan will testify that, while not actually with the defendant at the specific time of the alleged sale in Madison, they both had seen him in Chicago on May 10, 2001, as well as throughout the week of May 7, 2001." (R. 47 at 1-2.) In fact, the record indicates that Cooley had no other purpose for calling Pollard and Jordan except for this alibi testimony.

Second, the government's *post hoc* justification of Cooley's performance also fails as to alibi witness Ware, because a decision by Cooley not to timely provide notice of her would have been objectively unreasonable and thereby constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). The government ignores the fact that

F.3d at 360 ("Like the petitioner in *Clinkscale*, Petitioner was forced to present uncorroborated testimony for his only defense, alibi, and this lack of corroboration 'must have significantly affected the jury's assessment of' Petitioner's guilt.") (citation omitted).

The government's second argument, that in *Clinkscale* "the prosecution's identification testimony was 'highly suspect,'" also does not distinguish the two cases, because the identification evidence against Miller was also questionable. As explained in broader scope and detail in the Petition (Pet. 18), and altogether ignored by the government, the identification evidence presented at Miller's trial was thin because, *inter alia*, the undercover police officer who identified Miller on the day of the transactions at issue, Gonzalez, made his identification at police offices from a photograph array that contained eleven photographs, all of which were of Miller.[2] Moreover, Miller's former co-defendant received substantial benefits from the government for his testimony and reviewed police reports describing Gonzalez's version of the events prior to testifying at trial.

The government's next attempt to distinguish *Clinkscale* also fails because it incorrectly relies upon the Seventh Circuit's "determin[ation] in petitioner's direct appeal that the additional alibi witnesses would not have affected the result at trial." (Opp. 8.) The government takes this same position elsewhere in its Opposition when it argues that Miller cannot establish prejudice because "in denying petitioner's claim that his trial counsel should have been granted an additional continuance . . . [t]he court applied the same prejudice standard that would apply to petitioner's ineffective assistance claim." (Opp. 7.) This argument fails for three reasons.

First, the government's argument ignores the Seventh Circuit's express limitation of its decision on direct appeal.

---

[2] In its statement of the case, the government asserts that "On May 7, 2001, [Gonzalez] met [Miller] while purchasing crack cocaine from Winfield at Winfield's apartment." The government's statement ignores the fact that Gonzalez could not identify Miller on May 7 as the person on Winfield's couch. (R. 116 at 28:23-29:5.)

Third, the government's argument contravenes the basic premise that a proper *Strickland* analysis requires the reviewing court to reweigh the government's evidence against the totality of the defendant's evidence. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). In order to ensure that a defendant has an opportunity to introduce all evidence of deficient attorney performance and prejudice, this Court held that a defendant may properly bring a *Strickland* claim in a § 2255 proceeding. *See Massaro v. United States*, 538 U.S. 500, 504-505 (2003) ("The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis."). In fact, the Seventh Circuit's prejudice findings on direct appeal were premised on the lack of evidence presented to them by counsel on direct appeal regarding the alibi witnesses' testimony. *See Miller*, 327 F.3d at 602, 605. Despite this limitation, the government now seeks to preclude Miller from introducing both evidence outside the record (the four proffered affidavits, which should be admitted, and additional testimony at an evidentiary hearing, if deemed necessary), and evidence in the record that his attorneys on direct appeal did not present when they were arguing a different claim. Contrary to the government's assertion, this Court has made clear that Miller may bring his ineffective assistance of counsel claim in a § 2255 petition and have the totality of the evidence of deficient attorney performance and prejudice weighed by the courts.

The government's final attempt to distinguish *Clinkscale* on prejudice grounds, "that the jury heard testimony to the effect that petitioner 'inten[ded] to produce false alibi witnesses'" (Opp. 8-9), is also unconvincing. The testimony at issue came from Winfield (Pet. 5), which is not surprising given the considerable issues surrounding his testimony. Moreover, even if Detective Twing's testimony that Miller "could control what people say" (R. 118 at 122-24), is true, it is merely character evidence from a previous attempt by Miller to provide assistance to the police to solve an unrelated case (in which Miller was not charged). It does not demonstrate that Miller persuaded the uncalled alibi

Respectfully submitted,

TODD A. FRANKEL
Counsel of Record
ANDREW J. JARZYNA
THOUFIQ A. KUTTY
AMY M. GARDNER
333 West Wacker Drive,
Suite 2100
Chicago, IL 60606
(312) 407-0700

February 20, 2007

FILED
FEB 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-643

In the Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CHICAGO COUNCIL OF LAWYERS IN SUPPORT OF PETITIONER

DAVID R. MELTON
Counsel of Record
JEFFREY W. SARLES
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether a federal court of appeals' failure to allow oral argument, over the objection of one of the three panel members, violates the unanimity requirement of Federal Rule of Appellate Procedure 34(a)(2).

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE COURT SHOULD GRANT THE PETITION TO ENSURE THAT THE COURTS OF APPEALS GIVE EFFECT TO THE UNANIMITY PROVISION IN RULE 34(A)(2) 3

II. ONLY THIS COURT CAN ASSURE THAT RULE 34(A)(2) REMAINS AN IMPORTANT BULWARK AGAINST THE EROSION OF PARTIES' PROCEDURAL RIGHTS ON APPEAL 6

III. ENFORCEMENT OF RULE 34(A)(2) IS ESPECIALLY IMPORTANT IN CASES INVOLVING SUBSTANTIAL PRISON SENTENCES 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

FCC v. *WJR, the Goodwill Station Inc.*, 337 U.S. 265 (1949) 3

STATUTES, RULES AND REGULATIONS

28 U.S.C. § 2255 8

Commission On Revision Of The Federal Court Appellate System, *Structure And Internal Procedures: Recommendations For Change*, 67 F.R.D. 195 (1975) 6

Federal Rule of Appellate Procedure 34(a)(2) ..... passim

S. Ct. Rule 37.6 1

MISCELLANEOUS

Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913 (1995) 4, 5, 9

Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35 (1986) .6, 9

Joe S. Cecil and Donna Stienstra, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS, Federal Judicial Center Report, Section I, Table 1 (1987) 5

COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report (Dec. 18, 1998) 4, 5, 6, 7

Harvard Law School Occasional Pamphlet No. 9 (1967) 9

http://www.uscourts.gov/judicialfactsfigures/Table202.pdf 5, 6

TABLE OF AUTHORITIES—continued

Page(s)

Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1 (1986) 6

Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio State L.J. 1385 (1990) 5, 6, 7, 9

Chief Justice Rehnquist, THE SUPREME COURT 276 (1987)... 9

William R. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996) 4, 6, 9

William T. Rule & Jeffrey Jackson, *After the Split – The Recent Workload of the Court of Appeals for the Fifth Judicial Circuit*, 14 Miss. C. L. Rev. 281 (1994) 5

S. Wasby, S. Peterson, J. Schubert & G. Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. Ill. U. L. Rev. 1 (1992) 8

BRIEF OF CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chicago Council of Lawyers ("Council") is a non-partisan, public interest bar association comprised of approximately 1200 attorneys from all sectors of the profession. Established in 1969, it is dedicated to improving the quality of justice in the legal system and encouraging the fair and efficient administration of justice in the Chicago area. The Council works to make the justice system more effective, to promote accountability and equity in the law, and to ensure equal justice for every individual, regardless of social status.[1]

The Council seeks to achieve these goals in several ways. The Council studies and suggests improvements to local legal institutions and programs, such as the public defender's office and county processes for the collection of child support payments. The Council also analyzes and critiques the performance of judges and courts in the Chicago area. This work includes candid evaluations of candidates running for judicial office, state court judges, and federal district and appellate judges sitting in Chicago. See, *e.g.*, the "Federal Judicial Evaluations" section on the Council's website, www.chicagcouncil.org. In addition, the Council monitors local court operations, including those of the U.S. Court of Appeals for the Seventh Circuit, and suggests procedural improvements. See, *e.g.*, *Statement of the Chicago Council of Lawyers to the Commission on Structural Alternatives for the Federal Courts of Appeal* (Apr. 3,

[1] Pursuant to S. Ct. Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

1998).[2] Finally, the Council works with other groups to protect individual liberties and civil rights by urging appropriate reforms and, in select cases, participating in litigation.

The Council's members share a strong belief in the need for candid and informed analysis in proposing solutions to problems that hamper the proper functioning of our legal institutions. Consistent with that mission, the Council urges the Court to review the Seventh Circuit's failure to adhere to the unanimity rule set forth in Fed. R. App. P. 34(a)(2) when it failed to permit oral argument on petitioner's appeal.

SUMMARY OF ARGUMENT

This case involves an improper denial of a party's right to be heard at oral argument. In the name of efficiency, the number of oral arguments has been steadily declining for years. To assure that such efficiency concerns do not trump a party's right to be heard on appeal, Congress mandated that oral argument "must be allowed in every case" unless the panel unanimously agrees that it would serve no purpose. Fed. R. App. P. 34(a)(2).

The Petition provides the Court with an ideal opportunity to ensure that the courts of appeals follow that mandate. Because of a published dissent, the record in this case plainly shows that the panel below did not unanimously agree to dispense with oral argument. Yet, the panel majority refused to allow oral argument, in plain contravention of Rule 34(a)(2).

That refusal is particularly disturbing because substantial liberty interests are at stake in this case. Petitioner faces a long prison sentence based on a trial at which, the record suggests, he was deprived of a fair opportunity to present a defense of innocence. On post-conviction review, his appointed appellate counsel was denied the opportunity to

---

[2] www.ChicagoCouncil.org/projects/fd_evaluations/council.htm.

present oral argument, even though one member of the Seventh Circuit panel believed such argument was warranted. This was not an oversight. When the Rule 34(a)(2) violation was called to the court of appeals' attention in a request for rehearing, the court still refused to allow oral argument despite the lack of unanimity on the panel. This Court should grant the Petition, reverse, and remand with instructions to allow oral argument before reaching a decision on petitioner's appeal from denial of his post-conviction petition for review.

ARGUMENT

I. The Court Should Grant The Petition To Ensure That The Courts Of Appeals Give Effect To The Unanimity Provision In Rule 34(a)(2).

The Petition presents a rare opportunity for the Court to address one aspect of a growing problem: the steady erosion of the parties' right to present oral argument in the federal courts of appeals.

This Court has long held that "in some situations [oral] argument is essential to a fair hearing." *FCC* v. *WJR, the Goodwill Station Inc.*, 337 U.S. 265, 275 (1949). The Court also recognized that, in other situations, oral argument may not be necessary. Thus, "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances" *Id.* at 276. Congress subsequently adopted a rule recognizing and protecting the importance of oral argument by erecting a procedural obstacle that must be overcome before oral argument may be scuttled. That Congressional mandate is found in Rule 34(a)(2) in the Federal Rules of Appellate Procedure.

Rule 34(a)(2) guarantees that a party may present oral argument if any panel member believes such argument is warranted. It provides:: "Oral argument *must* be allowed in every case unless a panel of three judges * * * *unanimously*

agrees that oral argument is unnecessary * * *" (emphasis added). The unanimity requirement in Rule 34(a)(2) is unambiguous and unqualified, reflecting the decisive view of Congress on this question as one of the mandated minimal levels of process to which a litigant is entitled in the federal appellate courts.

For at least the first half of the twentieth century, most parties in the federal circuit courts had the right to submit briefs in support of their position, to present oral argument explaining the issues to the panel assigned to hear the case, and to receive an opinion explaining the reasons for the panel's decision. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report, at 13-25, 70 (Dec. 18, 1998); William R. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 274 (1996); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 952 (1995). The last fifty years, however, has seen an erosion of these procedural rights. This erosion is reflected in the steadily increasing number of cases decided in summary, unpublished, or non-precedential opinions, often without the benefit of oral argument.

Indeed, the incidence of federal appellate cases decided without oral argument has increased dramatically. In 1950, virtually all federal appeals were resolved only after oral argument. Baker, *supra*, note 13. The trend away from oral argument began in the 1970s in response to rising case loads. Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio State L.J. 1385, 1388-1389 (1990). Studies show that, by 1975, the percentage of federal appeals with oral argument had fallen to roughly 70% and continued to fall to 56% in 1985, 40% in 1997, and 30% in 2005. See Joe S. Cecil and Donna Stienstra, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS

OF APPEALS, Federal Judicial Center Report, Section I, Table 1 (1987); William T. Rule & Jeffrey Jackson, *After the Split – The Recent Workload of the Court of Appeals for the Fifth Judicial Circuit*, 14 Miss. C. L. Rev. 281, 300 (1994); 1998 Commission Report, *supra*, at 22, Table 2-6; Judicial Facts and Figures, Table 2.2.[3]

To be sure, there are conflicting views over the significance of this dramatic decline in oral argument opportunities. Some judges and academics deny any significant impact on the quality of justice or regard this decline as necessary to achieve greater efficiencies in the face of a growing caseload. *E.g.*, Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1 (1986); 1998 Commission Report, *supra*, at 21-25. But others believe that the declining number of cases in which oral argument is permitted threatens to seriously undermine the quality of justice dispensed by the federal courts of appeals. See Richman and Reynolds, *supra*, at 279-281, 294-297; Merritt, *supra*, at 1388-1390; 1397; Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35 (1986).

It is important to recognize that Congress was well aware of such differing views when it adopted Rule 34(a)(2). In the mid-1970s, various federal circuits were experimenting with a variety of procedures to curtail or eliminate oral argument, and changes to the appellate rules of procedure were being proposed to authorize or limit those experiments. See Commission On Revision Of The Federal Court

---

[3] http://www.uscourts.gov/judicialfactsfigures/Table202.pdf. For the comparable 1997 figure with pro se cases excluded, see 1998 Commission Report, *supra*, at 22, Table 2-6; for an alternative 1990 estimate excluding jurisdictional defect cases, pro se cases and cases in which parties waived oral argument, see Merritt, *supra*, at 1388.

Appellate System, *Structure And Internal Procedures: Recommendations For Change*, 67 F.R.D. 195, 254-255 (1975) (recognizing the importance of oral argument by recommending a rule that evolved into Rule 34(a)(2)). In 1979, after hearing extensively from interested parties and observers, Congress decided to adopt the unanimity requirement set forth in Rule 34(a)(2), thereby creating a significant obstacle to dispensing with oral argument on appeal. Strict compliance with that requirement thus both gives effect to the will of Congress and helps ensure that the courts of appeals have the full benefit of the parties' views when resolving issues on appeal. *Id.*

II. Only This Court Can Assure That Rule 34(a)(2) Remains An Important Bulwark Against The Erosion Of Parties' Procedural Rights On Appeal.

Notwithstanding the adoption of Rule 34(a)(2) in 1979, the number of cases resolved by the federal circuits without oral argument has continued to increase. See *supra*, p. 4. Moreover, the likelihood of oral argument varies considerably among the circuits. See 1998 Commission Report, *supra*, at 22, Table 2-6; *Merritt*, *supra*, at 1388. These differences suggest a continuing resistance among some court of appeals judges to the presumption in favor of oral argument reflected in Rule 34(a)(2).

Cases like this, where a judge formally dissents from a refusal to permit oral argument, are relatively unusual. See Pet. 13 (citing cases). However, it is reasonable to infer that for every case in which there is a formal dissent, there are many more cases in which a panel judge disagrees with the other panel members' refusal to allow oral argument but decides not to go public with his or her views. Thus, the question presented is not one unique to this case but rather involves an important issue that affects all the circuit courts and that only this Court can resolve.

Moreover, the fact that the Seventh Circuit denied petitioner's rehearing petition, which pinpointed the panel majority's plain violation of Rule 34(a)(2), suggests that some appellate judges may regard that rule as nothing more than "words on paper" that they may freely ignore. Such an impression creates a serious risk of undermining the public's perception of judicial respect for the rule of law.

This Court, in the exercise of its supervisory powers over the federal courts, can redress that misperception by insisting that the courts of appeals adhere to Rule 34(a)(2) and allow oral argument unless *all* judges on the panel agree that it is unnecessary.

III. Enforcement Of Rule 34(a)(2) Is Especially Important In Cases Involving Substantial Prison Sentences.

The right protected by Rule 34(a)(2) is not inconsequential. Studies have shown that oral argument often affects the disposition of a case and may be "determinative of the outcome." S. Wasby, S. Peterson, J. Schubert & G. Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. Ill. U. L. Rev. 1, 30 (1992). As Justice Rehnquist attested, "in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench." Chief Justice Rehnquist, THE SUPREME COURT 276 (1987). Justice Brennan agreed, noting that "oral argument is the absolutely indispensable ingredient of appellate advocacy." Justice Brennan, quoted in Harvard Law School Occasional Pamphlet No. 9, at 22-23 (1967).

Lack of oral argument also can be dispositive. Commentators, including former federal appellate judges, have noted that "nonargued cases almost invariably result in an affirmance of the district court's decision." Bright, *supra*, at 43. "By decreasing oral argument, we upset the balance,

unconsciously increase the authority of our staff, and risk hasty decisions directed by the judgments of others." Merritt, *supra*, at 1392. It is not surprising, then, that "cases not argued are 'affirmed at a greater rate than cases in which argument occurs' and 'cases not argued are much less likely to be decided with a published opinion.'" Richman & Reynolds, *supra*, at 280-281; see also Baker, *supra*, at 917. Courts should be particularly wary of increasing the risk of error and injustice in cases like this, where a claim of actual innocence is being asserted and the effect may be wrongful and lengthy incarceration. The Seventh Circuit's treatment of its Rule 34(a)(2) obligation strongly suggests that the appropriate level of vigilance is *not* being maintained.

It bears emphasizing that this is a case in which petitioner (1) was initially identified using a questionable photo identification procedure, (2) was denied, due to inadequate representation by his initial trial counsel, the opportunity to call witnesses in support of his contention that he was in a different city when the crime in question occurred, (3) was represented at trial by substitute counsel who admittedly was inadequately prepared, and (4) had to prepare and file pro se the one substantive *habeas corpus* petition to which he is entitled under 28 U.S.C. § 2255. See Pet. 2-8. Even after appointed appellate counsel raised arguments about the inadequacy of petitioner's trial counsel, to which the district court opinion did not respond (see Pet. 18a), two members of the Seventh Circuit panel refused to permit oral argument without any explanation. Petitioner's subsequent request for rehearing expressly raising the panel's failure to follow Rule 34(a)(2) also was denied without explanation. A person facing a prison sentence in excess of 30 years for alleged involvement in relatively small drug transactions deserves more careful consideration of his arguments on appeal than he obtained here.

Even if the panel's initial failure to permit oral argument, despite the lack of unanimous agreement required

by Rule 34(a)(2), resulted from carelessness, the Seventh Circuit's failure to order rehearing indicates either deficiencies in its internal operating procedures or a failure to recognize the importance of complying with the Rule 34(a)(2) unanimity mandate. Either way, this case, which involves substantial liberty interests, presents an ideal opportunity to remind both the Seventh Circuit, and the courts of appeals as a whole, that oral argument is an important part of the appellate process that *cannot* be dispensed with unless the panel hearing the case unanimously agrees.

CONCLUSION

The Petition should be granted and the judgment of the Seventh Circuit reversed.

Respectfully submitted.

DAVID R. MELTON
Counsel of Record
JEFFREY W. SARLES
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Counsel for Amicus Curiae

FEBRUARY 2007

No. 06-643

IN THE

Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF FORMER JUDGES OF THE UNITED STATES COURTS OF APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ARTHUR F. FERGENSON
Counsel of Record
MICHAEL P. O'DAY
EMILY T. WRIGHT
DLA PIPER US LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Oral Argument Plays an Integral Role in the Decision-Making Process 6

II. Rule 34(a)(2) Grants a Minority Right to Each Judge 10

III. This Court Should Exercise Its Supervisory Power to Prevent Further Violation of Rule 34(a)(2) 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Boumediene v. Bush, No. 05-5062, Order Denying Motion for Leave to File Brief Amici Curiae (D.C. Cir. Dec. 29, 2006) 1

Franchise Tax Bd. v. Alcan Aluminum, Ltd., 493 U.S. 930 (1989) 11

Gravatt v. Paul Revere Life Ins. Co., No. 02-17028, 2004 WL 1257716 (9th Cir. 2004) 9

Hickman v. Taylor, 329 U.S. 495 (1947) 12

Mathews v. Weber, 423 U.S. 261 (1976) 11

Milliken v. Bradley, 433 U.S. 267 (1977) 2

McCarthy v. United States, 394 U.S. 459 (1969) 12

Rasel v. Bush, 542 U.S. 466 (2004) 2

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 12

United States v. Shannon, 342 U.S. 288 (1952) 10

Statutes, Rules, and Regulations

Federal Rule of Appellate Procedure 34(a)(2) 4, 5, 7, 10, 11, 12

Federal Rule of Civil Procedure 35 12

Federal Rule of Criminal Procedure 11 12

Supreme Court Rule 10(a) 11

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

Supreme Court Rule 38.1 (Former) 11

Other

Advisory Opinion No. 72, Committee on Codes of Conduct, Judicial Conference of the United States.... 1

Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument,* 72 IOWA L. REV. 35 (1986) 6, 8, 9

Joe S. Cecil & Donna Stienstra, Fed. Judicial Ctr., DECIDING CASES WITHOUT ARGUMENT; AN EXAMINATION OF FOUR COURTS OF APPEALS (1987) 11

Commission on the Revision of the Federal Court Appellate System, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) 9, 9–10

Irving R. Kaufman, *Appellate Advocacy in the Federal Courts,* 79 F.R.D. 165 (1977) 8–9

Alex Kozinski, *In Praise of Moot Court—Not!,* 97 COLUM. L. REV. 178 (1997) 7–8

Wade H. McCree Jr., *Bureaucratic Justice: An Early Warning,* 129 U. PA. L. REV. 777 (1981) 8

Sandra Day O'Connor, *The Threat to Judicial Independence,* Wall St. J., Sept. 27, 2006, at A18 12–13

Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM (1985) 6–7

Robert L. Stern, et al., SUPREME COURT PRACTICE (8th ed. 2002) 10, 11

The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 128 F.R.D. 409 (May 24, 1989) 6, 8, 9

Patricia M. Wald, *Bureaucracy and the Courts,* 92 YALE L. J. 1478 (1983) 6, 9

INTEREST OF THE AMICI CURIAE[1]

Amici curiae are former judges of the United States Courts of Appeals.[2]

Arlin M. Adams was appointed to the United States Court of Appeals for the Third Circuit in 1969 and served on that court until 1987. Mr. Adams served on the board of the Federal Judicial Center and as a member of the Judicial Nominating Commission. Both the Arlin M. Adams Center for Law and Society at Susquehanna University and the Arlin M. Adams Professorship on Constitutional Law at the University of Pennsylvania School of Law were established in his honor. Mr. Adams is a litigator and appellate advocate in private practice.

John J. Gibbons graduated from Harvard Law School in 1950, and was in private practice until appointed to the United States Court of Appeals for the Third Circuit in 1970. During his twenty years on that court, he published numerous opinions and served as Chief Judge from 1987 to

---

[1] Pursuant to Supreme Court Rule 37.6, the *amici curiae* certify that no counsel for a party authored the brief in whole or in part, and that no person or entity, other than the *amici curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such letters of consent have been filed with the Clerk of this Court. Sup. Ct. Rule 37.2(a).

[2] Care has been taken to avoid using the title "Judge" in these papers to designate a former judge "unless the designation is necessary to describe accurately the person's status at a time pertinent to the lawsuit." *See Boumediene v. Bush*, No. 05-5062, Order Denying Motion for Leave to File Brief Amici Curiae at 3 (D.C. Cir. Dec. 29, 2006). For the reasons set forth in the statement by Circuit Judge Rogers, *amici* submit that the Order improperly applied Advisory Opinion No. 72, Committee on Codes of Conduct, Judicial Conference of the United States. The judicial service of *amici*, three of whom served as Chief Judge, is no secret to the members of this Court and is highly pertinent to the sole issue to which they speak in this brief: the importance of oral argument to appellate judges.

1990. Upon his retirement, he was a professor of constitutional law at Seton Hall University Law School then returned to private practice in 1997. In 2004, Mr. Gibbons successfully argued before this Court for the right of Guantanamo detainees to challenge their detention in the courts of the United States. *See Rasel v. Bush*, 542 U.S. 466 (2004).

Shirley M. Hufstedler was a private litigator in private practice for ten years and Special Legal Consultant to the Attorney General of California for one year before she was appointed judge of the Los Angeles County Superior Court in 1961. In 1966, she was appointed Associate Justice of the California Court of Appeal. In 1968, she was appointed to the United States Court of Appeals for the Ninth Circuit. She served on that court for eleven years before resigning to accept the position of United States Secretary of Education under then-President James E. Carter. She returned to private practice in 1981. Ms. Hufstedler has served on the board of numerous organizations, including the Institute for Judicial Administration, the American Law Institute, and the Advisory Council for Appellate Justice.

Before his appointment to the federal bench, Nathaniel R. Jones established a distinguished career in the public sector. He served as Executive Director of the Fair Employment Practices Commission, an Assistant United States Attorney for the Northern District of Ohio, and Assistant General Counsel for the Kerner Commission, an independent committee charged with investigating the cause of urban rioting in the 1960s. In 1969, Mr. Jones became General Counsel of the NAACP and in that capacity he argued several cases before this Court, including *Milliken v. Bradley*, 433 U.S. 267 (1977), in which he successfully defended a plan for the desegregation of the Detroit school system. He was nominated to the United States Court of Appeals for the Sixth Circuit in 1979 and he served on that court for twenty-two years until his retirement in 2002.

James K. Logan has enjoyed a career as legal academic, federal appellate judge, and practitioner. After graduating from Harvard Law School in 1955, Mr. Logan became a professor at the University of Kansas School of Law and later served as dean of that school. He also taught at Harvard University, the University of Texas, Stanford University, the University of Michigan, and Duke University. In 1977, he was appointed to the United States Court of Appeals for the Tenth Circuit and served on that court for twenty-one years. During his time on the court, he chaired the Advisory Committee of the United States Judicial Conference, which was responsible for rewriting the Federal Rules of Appellate Procedure.

Abner J. Mikva attended the University of Chicago School of Law and clerked for the Honorable Sherman Minton, Associate Justice of this Court. Mr. Mikva was elected to the United States Congress in 1969 and served five terms until he resigned in 1979 to accept an appointment to the United States Court of Appeals for the District of Columbia Circuit. He was an appellate judge of that court for fifteen years and Chief Judge for the last four. He resigned from the federal bench in 1994 to serve as White House Counsel for then-President William J. Clinton. He taught law at both Northwestern University and the University of Chicago School of Law and currently is chair of the Illinois Human Rights Commission.

H. Lee Sarokin spent twenty-five years as a trial lawyer until he was appointed to the United States District Court for the District of New Jersey in 1979. He served on that court for fifteen years until 1994 when then-President William J. Clinton appointed him to the United States Court of Appeals for the Third Circuit. Mr. Sarokin authored more than 2000 opinions, acted as a member of the Judicial Conference on Court Administration and Case Management, and twice chaired the National Conference of Federal Judges. He retired from the court in 1996 and is currently a

Distinguished Jurist in Residence at the University of San Diego School of Law.

Patricia M. Wald graduated from Yale Law School in 1951, and clerked for Judge Jerome N. Frank of the United States Court of Appeals for the Second Circuit. She spent ten years as a public interest litigator and served for three years as Assistant Attorney General of the United States for the Office of Legislative Affairs. In 1979, she was appointed to the United States Court of Appeals for the District of Columbia Circuit, where she remained for twenty years and served as Chief Judge from 1986 to 1991. Since retiring from the court, Ms. Wald has represented the United States as a judge of the International Criminal Tribunal for the Former Yugoslavia at The Hague, Netherlands and served as a member of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction.

As a result of their long careers as litigators, appellate advocates, and judges, *amici curiae* have participated in, and benefited from, oral argument. Their experience afforded them ample opportunity to witness firsthand the integral role oral argument plays in the appellate decision-making process. *Amici curiae* are uniquely poised to attest to the value oral argument contributes to the appellate process and offer a perspective on the issue not reflected by the parties or other *amici*. *Amici curiae* have an interest in assuring that oral argument and the vital place it holds in the appellate system be preserved as guaranteed by the Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

Petitioner Stacey Miller asserts that two judges of the Seventh Circuit Court of Appeals violated Federal Rule of Appellate Procedure 34(a)(2) (hereinafter "Rule 34" or "the Rule") when it disposed of his case without oral argument

despite the fact that one judge on the panel would have heard argument. Cert. Pet. p. 9. In violating Rule 34, the panel did not simply deny the litigant an opportunity to be heard. The panel also denied its own member one of an intermediate federal appellate court judge's most valued rights: the right to hear oral argument in those cases in which the judge deems it beneficial. When the two judges directed that there be no oral argument in Petitioner's case over the objection of Judge Kenneth F. Ripple, the two judges compromised the decision-making process of the entire panel. Judges have stressed the valuable role oral argument plays in decision-making: oral argument affords judges the opportunity to supplement the briefs, assess early impressions, interact with counsel, and evaluate the merit of presented issues.

By allowing an intermediate federal appellate judge to insist on oral argument, even when the other two members of a panel would deny it, Rule 34 confers a minority right on each judge. That minority right is analogous to this Court's own procedure for determining which cases it will review. The "Rule of Four" provides for plenary review when four Justices out of nine favor granting a petition for writ of certiorari. This Court recognizes the valuable role oral argument plays in that review, as evidenced by its reluctance to render a decision without the benefit of oral argument.

An exercise of this Court's supervisory power is warranted here in order to protect the minority right granted each judge and preserve the important role oral argument plays in the federal appellate process. Ordinarily a litigant has no way of knowing when a member of his panel has been thusly denied; it is only when a judge takes the initiative to dissent, as happened here, that a violation of Rule 34(a)(2) comes to light. The intermediate federal appellate courts are themselves entrusted with powers of review over the lower courts; it is essential to their legitimacy that they not ignore their own rules.

This Court should grant the instant petition to ensure that the practice of denying oral argument over the objection of a judge of a United States Court of Appeals does not become an accepted practice in violation of the Federal Rules of Appellate Procedure.

ARGUMENT

I. Oral Argument Plays an Integral Role in the Decision-Making Process.

Oral argument plays an integral role in the decision-making process, as judges of the federal appellate courts (including this Court) themselves attest. *See* The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 128 F.R.D. 409, 537 (May 24, 1989) ("I find oral argument very important . . . . I wouldn't change the process for all the tea anywhere. I think oral argument is as vital as the briefs.") (statement of Paul R. Michel, Judge of the Federal Circuit Court of Appeals); Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 36 (1986) ("[O]ral argument is an essential component of the decisionmaking process and plays an important role in assisting the appellate judge in reaching a decision.") (then-Judge of the Eighth Circuit Court of Appeals); Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L. J. 1478, 1484 (1983) ("In the environment of judicial decisionmaking, oral argument is a vital but endangered species.") (then-Judge of the District of Columbia Circuit Court of Appeals). Indeed, Judge Richard A. Posner, Judge of the Seventh Circuit Court of Appeals and a member of the panel below, has praised oral argument as "provid[ing] a period of focused and active judicial consideration of the

case." Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 120 (1985).[3]

The support appellate judges show for oral argument is fitting, as they are its true beneficiaries. Oral argument is a tool of persuasion and the judges are the ones to be persuaded. They are the decision-makers. As the decision-makers, judges have identified several important functions oral argument serves in the decision-making process:

(1) Judges value oral argument as an essential supplement to the parties' briefs.[4] Oral argument "is a time to tie up loose ends, to amplify points made in the briefs, and most important, to answer the judges' questions [formed while reading the briefs] . . . . The briefs often raise questions and misconceptions that a skillful lawyer can answer or assuage during colloquy with the court." Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 187–88 (1997) (Judge of the Ninth Circuit Court

---

[3] That Judge Posner can advocate in favor of the very practice that he denied to a fellow member of the panel is testimony of the need for intervention by this Court to ensure that the right of a single judge to compel oral argument is protected against the will of the majority. Letting one judge place a case on the argument calendar may not be the most efficient use of judicial resources, but efficiency is not the way of Rule 34 or of process-oriented minority rights. Due process is not an interest grounded in economic determinism.

[4] Indeed, this appears to be a primary reason Judge Ripple called for oral argument:

> In the case before us, the appeal cannot be considered facially frivolous. Indeed, both parties have submitted extensive and thoughtful briefs. Nor can the discussion of the issue [adopted by the panel] . . . be said to be totally responsive to the presentation of the appellant in this court. . . .
>
> Accordingly, I respectfully dissent . . . [and] would set this case for oral argument in due course."

Cert. Pet. App. 18a.

of Appeals). Speaking during a panel discussion on oral argument in 1983, Justice William H. Rehnquist stated: "You could write hundreds of pages of briefs, and . . . still never [be] absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. [At argument,] you know that you do have an opportunity to engage or get into the judge's mental process." Bright, *supra*, at 36–37.

(2) Judges value oral argument as an opportunity to assess their early impressions. Judge Michel referred to oral argument as "a chance to test our thinking." 128 F.R.D. at 535. Then-Judge Bright echoed this sentiment, stating: "The argument gives the court . . . an opportunity to test ideas and to discuss problems about the case with counsel. The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result." Bright, *supra*, at 38. Then-Professor of Law Wade H. McCree, Jr., former Judge of the Sixth Circuit Court of Appeals and former Solicitor General of the United States, wrote: "My experience . . . leads me to believe that oral argument . . . is often useful for both the bench and bar . . . . Cases that clearly seem predestined . . . to affirmance without opinion . . . sometimes seem less predestined after oral argument." Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 790 (1981) (internal quotation marks omitted).[5]

(3) Judges value the personal interaction oral argument affords. Oral argument "enables counsel to add the stress and verbal emphasis that cannot be easily communicated on the cold page of the printed brief. [It] is counsel's opportunity to persuade, to turn the heads of the judges a little, to leave them with the working hypothesis

---

[5] The use of the word "predestined" is particularly apt in evaluating the reasoning behind a rule that orders oral argument when one member of the panel calls for it, even in the face of two other members who may have made up their minds based on the briefs.

that his client deserves to win." Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1977) (Chief Judge of the Second Circuit Court of Appeals). Justice John M. Harlan once remarked: "[Oral argument] gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute . . . for the Socratic method of procedure in getting at the real heart of an issue and finding out where the truth lies." Commission on the Revision of the Federal Court Appellate System, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 66–67 (1975) [hereinafter "Hruska Commission Report"].

(4) Similarly, judges value oral argument as an opportunity to identify and evaluate the issues raised by a case. Advocating for the preservation of oral argument, then-Judge Wald stated: "Seemingly inauspicious cases can blossom into consequential ones through probing interrogation . . . . Pointed inquiry can identify areas where the law is clear or muddled, where the case may be disposed of summarily or may require more lengthy treatment." Wald, *supra*, at 1484. This was Judge J. Clifford Wallace's point when he dissented to the majority's decision not to hear oral argument in *Gravatt v. Paul Revere Life Ins. Co.*: "In our rush to limit our time on the bench, a party may have suffered a reversal when twenty minutes of oral argument could have satisfied a majority that this outcome is unwarranted." No. 02-17028, 2004 WL 1257716, at *6 (9th Cir. 2004).

(5) The above factors together are accorded further significance by the way they can interact to influence votes. Eighty percent of judges agree that oral argument is important to the resolution of cases. Bright, *supra*, at 39. In response to the question whether oral argument has "actually changed [his] mind," Judge Michel responded that it had "many times." 128 F.R.D. at 536–37. And speaking in 1972 at the Third Judicial Conference, Justice William J. Brennan

remarked: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument not to be terribly concerned for myself were I to be denied oral argument." Hruska Commission Report, *supra*, at 66.[6]

II. Rule 34(a)(2) Grants a Minority Right to Each Judge.

The unanimity requirement of Rule 34(a)(2) vests in each member of the panel a minority right to hear oral argument. One judge may insist that argument be held, and that decision of one judge binds the other two. The creation of a minority right underscores the importance of oral argument; to strip a judge of that right removes an important feature of the appellate process.

This Court's procedure for determining which cases to review also embodies the right of a minority of Justices. The "Rule of Four," an uncodified but a longstanding practice, calls for plenary review of a case when four Justices favor granting the petition. Robert L. Stern et al., SUPREME COURT PRACTICE 296 (8th ed. 2002); *see also United States v. Shannon*, 342 U.S. 288, 298 (1952) (Brennan, J., dissenting) ("By long practice—announced to the Congress and well known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari."). The Justices follow the same Rule of Four to determine briefing and oral argument of an appeal. Stern, *supra*, at 296. By virtue of the Rule of Four, a minority is able to control the

---

[6] Even if oral argument never changed the mind of a single member of the judiciary, it is still protected by Rule 34 as a right of the litigants, lawyers, and judges. As such, the judges of the United States Courts of Appeals are obliged to respect the judgment of the adoptive authorities against any inconveniences that might occur as a result of rules enforcement. *See* Cert. Pet. p. 11 (discussing the policy considerations that influenced the adoption of Rule 34(a)(2)).

Court's argument docket. The Rule of Four is thus a cognate of Rule 34.

Further, the decision to grant certiorari often results in oral argument. Stern, *supra*, at 673 ("[W]here the petition for certiorari is granted . . . further briefing and oral argument are expected by the Court."). The Court has both denied parties' requests to submit on briefs, *see Franchise Tax Bd. v. Alcan Aluminum, Ltd.*, 493 U.S. 930 (1989), and appointed counsel to present argument when one is not available, *see Mathews v. Weber*, 423 U.S. 261 (1976). Indeed, former Supreme Court Rule 38.1 explicitly stated that the Court is "reluctant to accept the submission of briefs, without oral argument, of any case in which . . . certiorari has been granted." Stern, *supra*, at 673. Thus, this very Court utilizes a procedure in which the vote of a minority determines whether a litigant's case will, literally, be "heard."

Just as the Rule of Four promotes essential oral communication between this Court and the Bar, even when less than a majority requests it, so Rule 34(a)(2) promotes essential oral communication between judges of the appellate courts and the Bar, even when less than a majority requests it. The plain words of Rule 34(a)(2) must be followed to preserve this right, "highly valued" among judges. Joe S. Cecil & Donna Stienstra, Fed. Judicial Ctr., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS, at § VII.D (1987).

III. This Court Should Exercise Its Supervisory Power to Prevent Further Violation of Rule 34(a)(2).

Supreme Court Rule 10(a) states that this Court will, in its discretion, grant certiorari when "a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." A violation of

Rule 34(a)(2) is the type of departure that this Court has been granted the supervisory power to correct.

Where lower federal courts fail to correctly apply rules of procedure, this Court has provided guidance. *See McCarthy v. United States*, 394 U.S. 459, 463–64 (1969) (granting certiorari to review an appellate court's decision affirming a conviction based on a guilty plea that had been entered in the district court in violation of Rule 11 of the Federal Rules of Criminal Procedure); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964) (granting certiorari to review lower courts' construction of Rule 35 of the Federal Rules of Civil Procedure); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (granting certiorari to clarify the relationship between the discovery rules of the Federal Rules of Civil Procedure and attorney work product).

A violation of Rule 34 particularly compels an exercise of this Court's supervisory power, because of the nature of the Rule's operation as a dictate of operating practice. There is no telling with certainty the number of times that Rule 34(a)(2) has been violated because the Rule does not require a vote open to public scrutiny. As a result, violations are only exposed through the rare circumstance of a judge's written dissent, as occurred here. Also, it is especially important that the intermediate federal appellate courts, judicial bodies that themselves are entrusted with the power of review over lower courts, not be seen to ignore their own rules, thereby undermining their legitimacy when dispensing justice.[7]

---

[7] In a recent article warning that mounting criticism of an "activist judiciary" threatens judicial independence, Justice Sandra Day O'Connor (Retired) wrote:

> An independent judiciary does not mean . . . that it is somehow improper to criticize judicial decisions . . . . Judges can—and do—sometimes render erroneous decisions, but that is why appeals are allowed to higher courts . . . . Members of the judiciary cannot

This Court should act in this case in order to secure for judges and litigants alike the benefits of oral argument upon the demand of any judge of the United States Courts of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur F. Fergenson
Counsel of Record
Michael P. O'Day
Emily T. Wright
DLA Piper US LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000

> sincerely believe that they should be regarded as above the very laws they are charged with interpreting. Ours is, after all, a nation of laws[.]

Sandra Day O'Connor, *The Threat to Judicial Independence*, Wall St. J., Sept. 27, 2006, at A18.

FILED
FEB 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-643

In the Supreme Court of the United States

STACEY MILLER
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF NORTHWESTERN UNIVERSITY'S CENTER ON WRONGFUL CONVICTIONS AND OTHER INNOCENCE PROJECTS IN SUPPORT OF PETITIONER

STEVEN A. DRIZIN
Center on Wrongful Convictions
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60610
(312)503-3100

LINDA T. COBERLY
Counsel of Record
GENE C. SCHAERR
STEVEN J. WINGER
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-8768

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a federal court of appeals' failure to hold oral argument violates Federal Rule of Appellate Procedure 34(a)(2) and procedural due process where the dissenting judge objects to the panel's summary treatment of the appeal and explicitly states a desire for oral argument.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
INTEREST OF *AMICI CURIAE* 1
STATMENT 3
SUMMARY OF ARGUMENT 4
ARGUMENT 6
I. Federal appellate and post-conviction review plays a vital role in the detection and reversal of wrongful convictions. 6
II. The increasing tendency of federal courts of appeals to dispense with oral argument in cases like this one diminishes the effectiveness of post-conviction review and undermines the courts' ability to vacate wrongful convictions. 10
A. Oral argument promotes careful and accurate judicial decisionmaking and increases the fairness and transparency of the appellate process. 11
B. Federal courts of appeals are denying oral argument with increasing frequency, particularly on collateral review 15
C. The widespread denial of oral argument on direct *and* collateral review increases the likelihood that wrongful convictions will stand... 16
D. The denial of oral argument in this case directly violated FRAP 34(a)(2) and was otherwise inappropriate. 18
CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Bousley v. *United States*,
523 U.S. 614 (1998) 7

Bowers v. *DeVito*,
686 F.2d 616 (7th Cir. 1982) 19

Gravatt v. *Paul Revere Life Insurance, Co.*,
No. 02-17028, 2004 WL 1257716 (9th Cir.
2004) 19

O'Neal v. *McAninch*, 513 U.S. 432 (1995) 7

United States v. *Lambert*,
963 F.2d 711 (5th Cir. 1992) 19

STATUTES AND RULES:

28 U.S.C. § 2253 ..... 18, 20

28 U.S.C. § 2254 ..... *passim*

28 U.S.C. § 2255 ..... *passim*

Fed. R. App. P. 34 ..... *passim*

MISCELLANEOUS:

Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) 7

Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (Spring 1995) ..... *passim*

Adele Bernhard, *Effective Assistance of Counsel*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE, ed. Saundra D. Westervelt and John A. Humphrey, Rutgers University Press, 2001 7

Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (Oct. 1986) 12, 16-17

Cecil & Stienstra, FEDERAL JUDICIAL CTR. 87-5 ..... 17, 19

Lisa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001) 2

Roger A. Hanson and Henry W. K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, BUREAU OF JUSTICE STATISTICS, NCJ-155504 (September 1995) 9

Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Oral Argument*, 33 STETSON L. REV. 139 (Fall, 2003) 11-12

Timothy R. Johnson, *The Influence of Oral Argument on the U.S. Supreme Court*, AM. POL. SCI. REV., Vol. 1000, No. 1 ..... 11, 13-14

Judicial Business of the United States Courts, 2005 Annual Report of the Director, Supplemental Table S-1, available at http://www.uscourts.gov/judbus2005/tables/s1.pdf 6-7, 15

James S. Liebman, Jeffrey Fagan, and Valerie West, *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995*, 325 available at http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf 8-9

Gilbert S. Merritt, *Judges on Judging: The Decisionmaking Process in Federal Courts of Appeals*, 51 OHIO STATE L.J. 1385 (1990) 2

Stanley Mosk, *In Defense of Oral Argument*, 1 J. OF APP. PRACTICE AND PROCESS 25 (Winter 1999) 12-13

William M. Richman and William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (January 1996) 16

Barry Scheck, Peter Neufeld, and Jim Dwyer, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 242 (New American Library, 2003) 8

Michael E. and Jane B. Tigar, FED. APPEALS JURIS. & PRACTICE, § 10.1 (1997) 13

Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478 (1983) 14

INTRODUCTION

This case is part of a growing and dangerous trend in the federal courts—a trend that threatens the ability of criminal defendants and inmates to receive meaningful appellate review of their convictions. It concerns the practice of resolving appeals without oral argument, even where not all members of the appellate panel agree that the case should be resolved in that manner. The Federal Rules of Appellate Procedure specifically limit the circumstances under which an appellate panel may resolve a case without oral argument. The decision of the Seventh Circuit and others to ignore that limitation poses serious concerns for criminal defendants who rely on federal appellate and collateral review to ensure protection for their constitutional rights. *Amici* submit this brief to alert the Court of the unique harm this practice imposes on the wrongfully convicted. *Amici* respectfully urge this Court to intervene in this case to protect the availability of oral argument under the Federal Rules.

INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of Northwestern University's Center on Wrongful Convictions, the Indiana Innocence Project, the Wisconsin Innocence Project, and First Defense Legal Aid.

Northwestern University's Center on Wrongful Convictions was organized in 1999 as a program of the Bluhm Legal Clinic at Northwestern University School of Law. The Center is partially funded by the School of Law

---

[1] All parties have consented to the filing of this brief. Letters evidencing such consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation or submission of this brief.

but relies on private funding for more than half of its operating expenses. Dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice, the Center investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence. The Center or members of its staff have been instrumental in the exoneration of ten men who were sentenced to death in Illinois. The Center has a well-established tradition of researching the prevalence, causes, and social costs of wrongful convictions and advocating reforms designed to improve the accuracy and fairness of the criminal justice system.

The Indiana Innocence Project is a program of the Law Clinic at the Indiana University School of Law—Indianapolis. The mission of the Law Clinic is to provide representation to the underserved while advancing justice. The School's Wrongful Conviction Component of the Criminal Defense Clinic is a founding member of the Innocence Network. Representation is provided to Indiana inmates challenging their convictions in state and federal courts based on newly discovered scientific evidence and/or constitutional infirmity.

The Wisconsin Innocence Project was founded in 1998 as a project in the Frank J. Remington Center at the University of Wisconsin Law School. The Project provides legal assistance to federal and state inmates in Wisconsin and neighboring states who have provable claims that they were wrongly convicted. Under the supervision of attorneys, approximately 20 law students enrolled in the program investigate and litigate claims of innocence on behalf of prisoners.

Since its founding in 1995, First Defense Legal Aid ("FDLA") has worked to protect civil rights by offering free twenty-four-hour legal representation and advice to any individual taken into Chicago Police Department

custody until a public defender has been assigned by the court system. If a station visit is necessary, FDLA volunteers interview the arrestee, inform the arrestee of his or her constitutional rights, provide the arrestee with bond information, and serve as a link between the arrestee and his or her family.

Amici are uniquely well situated to advise the Court on the importance of oral argument to the wrongfully convicted and to those who believe their constitutional rights were violated in their criminal prosecutions. *Amici* are concerned that the increasing tendency of the federal courts of appeals to dispense with oral argument in the direct and collateral review of criminal convictions diminishes the effectiveness of such review, flouts the purposes of Rule 34, and undermines the courts' ability to detect and vacate wrongful convictions. Given their extensive experience representing the interests of the wrongfully convicted, both on direct appeal and in federal collateral proceedings, *Amici* have a substantial interest in the outcome of this case.

STATEMENT

This case provides a dramatic illustration of the dangers of dispensing with oral argument outside the circumstances outlined in Rule 34. Thus, *Amici* offer the following brief summary of the factual and procedural history in this case:

During his trial on federal drug charges, Petitioner's trial counsel failed to provide timely notice of three alibi witnesses who would have testified that Petitioner was out of town on the day in question. Pet. 4.[2] Counsel's

[2] "Pet. __" refers to the Petition for a Writ of Certiorari, which was filed with this Court on November 6, 2006. "Pet. App. __" refers to the Appendix filed with the Petitioner's Petition for a Writ of Certiorari.

failure resulted in the exclusion of the alibi witnesses' testimony. *Ibid.*

After he was convicted, Petitioner brought a petition for collateral review under 28 U.S.C. § 2255 arguing, *inter alia*, that his trial counsel's failure to provide timely notice of the alibi witnesses constituted ineffective assistance of counsel. Pet. 6-7. The district court denied the petition but issued a certificate of appealability as to Petitioner's ineffective assistance claim, noting that it could not "say that a reasonable judge would not make a different decision" regarding that claim. Pet. App. 16a; see also Pet 7. Petitioner timely appealed the district court's order denying his § 2255 petition to the United States Court of Appeals for the Seventh Circuit. Pet. 7.

Without hearing oral argument, a divided panel of the Seventh Circuit issued an unpublished order summarily affirming and adopting the district court's order. Pet. App. 1a-18a; see also Pet. 7. The dissenting judge objected to the summary treatment of Petitioner's appeal, noting that "the appeal cannot be considered facially frivolous" and that "[i]ndeed, both parties have submitted extensive and thoughtful briefs." Pet App. 18a; see also Pet. 8. The dissent also stressed that the district court's opinion was not "totally responsive" to the Petitioner's arguments on appeal and concluded that the panel did not fulfill its obligation to this Court to adequately explain its decision. *Ibid.* The dissent concluded by stating that he "would set this case for oral argument in due course." *Ibid.*

SUMMARY OF ARGUMENT

Direct and post-conviction review in the federal appellate courts is an invaluable safeguard against wrongful convictions. Direct appeals play a critical role in assuring the accuracy of criminal adjudications. Federal collateral review complements direct appellate review and

provides a vitally important mechanism for correcting constitutional violations that cannot be adequately addressed on direct appeal, including the ineffective assistance of counsel. Procedural shortcuts that weaken direct or collateral review in criminal cases—such as the denial of oral argument—increase the likelihood that wrongful convictions will be erroneously upheld on appeal.

Oral argument enhances the rigor, accuracy, and transparency of judicial decisionmaking. It focuses the attention of judges, challenges them to reflect critically about their preliminary assessments of a case, and forces them to confer and to decide cases collectively. All of this promotes careful and accurate judicial decisions. Oral argument also gives litigants an invaluable opportunity to respond directly to the judges' concerns before the case is decided and to present their case in open court, thereby promoting fairness, transparency, and judicial accountability. No amount of briefing can achieve these important results. For all these reasons, oral argument plays an important role in helping federal reviewing courts to detect and vacate wrongful convictions.

Nevertheless, oral argument has become the exception rather than the rule. Over seventy percent of criminal appeals decided on the merits in the federal courts of appeals are now decided without oral argument. The rate is even higher for appeals of habeas corpus claims. Although Rule 34 allows courts to dispense with oral argument under certain circumstances, the Rule requires all such decisions to be unanimous, thereby guaranteeing oral argument if even one judge on the panel thinks it appropriate. This important safeguard was disregarded in Mr. Miller's case, and this case is not alone. The practice of denying oral argument under these circumstances contravenes the letter and spirit of Rule 34 and increases the risk that a wrongful conviction will be

summarily affirmed without receiving the careful, sustained attention of a panel of judges.

This case amply illustrates the dangers of a hasty and non-unanimous denial of oral argument. Mr. Miller's appeal was not frivolous, and neither the district court nor the Government treated it as such. To the contrary, the district court granted Mr. Miller a certificate of appealability, and the Government thoroughly and carefully briefed the issues in the case. Despite the serious arguments offered by Mr. Miller's counsel, the Seventh Circuit adopted the analysis of the district court without further analysis of its own. And in doing so, the Court resolved Mr. Miller's claims in a manner that conflicts with precedent in the Sixth Circuit. As the dissent explained, oral argument should not have been denied under these circumstances.

ARGUMENT

I. Federal appellate and post-conviction review plays a vital role in the detection and reversal of wrongful convictions.

Direct and post-conviction review of federal criminal convictions is an invaluable safeguard against wrongful convictions. Direct appeals "play a critical role in assuring the accuracy of criminal adjudications." Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 578-79 (1992). A significant number of federal direct appeals lead to the reversal of erroneous convictions. *Id.* at 514-15. For example, in the twelve-month period ending on September 30, 2005, eleven percent of the criminal appeals decided on the merits by the federal courts of appeals resulted in reversals. See Judicial Business of the United States Courts, Table B-5, available at http://www.uscourts.gov/judbus2005/appendices/b5.pdf.

The reversal rate in the Third Circuit was over twenty-four percent. *Ibid.*

The complexity of contemporary criminal trials makes a direct appeal from a federal criminal conviction all the more important. Since the 1960s, constitutional criminal procedure has become "increasingly intricate," making it "less likely that a single authority can generate an accurate result." Arkin, at 514-15, 574. Trial judges must now rule on a myriad of complex procedural motions that affect the outcome of a trial. *Id.* Moreover, the complicated and difficult constitutional issues that are frequently raised in contemporary federal criminal trials "enhances the likelihood of trial error * * * and the corresponding need for corrective appellate process." *Id.* at 575. For all these reasons, procedural shortcuts that abridge the right to appeal "subject defendants to a material risk of erroneous conviction." *Id.* at 514-15.

As this Court has repeatedly recognized, federal collateral review of state and federal criminal convictions is an equally indispensable bulwark against wrongful convictions. See, *e.g.*, *O'Neal* v. *McAninch*, 513 U.S. 432, 442 (1995) (a basic purpose of habeas corpus is to cure "error of constitutional dimension—the sort that risks an unreliable trial outcome"); *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) ("one of the principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted") (citation and internal quotation omitted). Not all fundamental trial errors are corrected on direct appeal. Indeed, certain claims of constitutional violations—such as claims of ineffective assistance of counsel—cannot be adequately addressed on direct appeal. Such claims usually require an evidentiary hearing to prove non-record facts regarding the claimed ineffectiveness, such as whether the defendant's lawyers

incompetently failed to find exculpatory evidence; whether there existed a strategic justification for the lawyer's apparently unreasonable conduct; the extent of the lawyer's knowledge at the time, and so on.[3] See Lisa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1272-73 (2001); James S. Liebman, Jeffrey Fagan, and Valerie West, *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995*, 325 available at http://www.thejusticeproject.org/ press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf. Accordingly, "[t]he correction of this type of error is * * * unlikely to be accomplished on direct appeal," and most ineffective assistance claims "must be brought in a post-appellate collateral attack proceeding which, in the federal courts, means a federal habeas corpus proceeding pursuant to 28 U.S.C. § 2255." Griffin, 16 AM. U. INT'L L. REV. at 1272-73.[4]

---

[3] Claims of prosecutorial misconduct (*e.g.*, claims alleging that prosecutors withheld or suppressed exculpatory information from the defense) also require additional fact-finding and the consideration of non-record evidence. Prosecutorial misconduct is a factor in a substantial number of wrongful convictions and is a common basis for reversal. See, *e.g.*, James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System, Part II: Why There Is So Much Error In Capital Cases, And What Can Be Done About It*, Questions About the Study at 7, available at http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii-qa.html.

[4] Ineffective assistance of counsel "is a significant cause of wrongful convictions in the United States." Griffin, 16 AM. U. INT'L L. REV. at 1272. A recent landmark study of wrongful convictions found that "32 percent of the wrongfully convicted had subpar or outright incompetent legal help." Barry Scheck, Peter Neufeld, and Jim Dwyer, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 242 (New

A substantial number of unconstitutional convictions and sentences are vacated on federal collateral review. In the year 2000, 11.6% of all petitioners who brought claims under 28 U.S.C. § 2255 were successful. See http://teddy.law.cornell.edu:8090/questcv3.htm.[5] The success rate for such claims in the Seventh Circuit that year was twenty-eight percent. *Ibid.*[6] These statistics

---

American Library, 2003). Another study concluded that ineffective assistance was the "primary cause" of almost three percent of all unjust convictions. Adele Bernhard, *Effective Assistance of Counsel*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE, ed. Saundra D. Westervelt and John A. Humphrey, Rutgers University Press, 2001, at 237 n.20 (citation omitted). The problem is even more pervasive in capital cases, where "incompetent lawyering" is "by far and away" the most common basis for habeas reversal. Liebman, *et al.*, *A Broken System, Part II: Why there Is So Much Error In Capital Cases, And What Can Be Done About It*, Questions About the Study at 7,available at http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii-qa.html.

[5] This webpage features a database of federal district-court civil cases terminated from 1987-2000, searchable by type of claim raised and disposition. The data were gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research.

[6] The success rate for federal habeas corpus claims brought by state prisoners in non-capital cases is lower than the success rate for claims brought pursuant to § 2255. See Roger A. Hanson and Henry W. K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, BUREAU OF JUSTICE STATISTICS, NCJ-155504 (September 1995), at 17 (finding that federal courts "granted 1% of the issues" on the merits in § 2254 habeas proceedings); http://teddy.law.cornell.edu:8090/questcv3.htm (success rate in all federal districts for claims decided in the year 2000 was 3.5%). Although these rates may seem comparatively low at first blush, it must be

confirm that federal collateral review plays a critical role in detecting and correcting fundamental errors and violations of a defendant's constitutional rights—many of which cannot be adequately addressed on direct appeal. This makes it a unique and indispensable tool for preventing wrongful convictions.

II. The increasing tendency of federal courts of appeals to dispense with oral argument in cases like this one diminishes the effectiveness of post-conviction review and undermines the courts' ability to vacate wrongful convictions.

Oral argument enhances the accuracy, fairness, and transparency of judicial decisionmaking. It therefore plays an important role in helping federal reviewing courts to detect and vacate wrongful convictions. As discussed further below, cases decided without oral argument are more likely to be summarily affirmed without receiving careful, sustained attention by a panel of judges. This increases the risk that some wrongful convictions will be erroneously upheld on appeal.

Nevertheless, federal courts of appeals now decide the great majority of appeals without oral argument. This trend is increasing, and it is particularly pronounced on collateral review. The routine denial of oral argument contravenes the purposes of Rule 34. Although that Rule permits a panel of judges to dispense with oral argument in appropriate circumstances, it requires all such decisions to be unanimous, ensuring that every case will receive the attention deemed appropriate by the most cautious judge on the panel. This important safeguard was disregarded in Mr. Miller's case, and this is by no

---

remembered that most state prisoners who bring claims under § 2254 have received a full round of state post-conviction review before filing their federal claims under § 2254.

means an isolated occurrence. The wholesale denial of oral argument in this manner weakens federal reviewing courts' ability to detect and correct wrongful convictions. Mr. Miller's case is a prime example of the erroneous and prejudicial denial of oral argument.

A. Oral argument promotes careful and accurate judicial decisionmaking and increases the fairness and transparency of the appellate process.

Oral argument increases the rigor and accuracy of judicial decisions. As many judges have acknowledged, oral argument "engages the attention of judges and makes them think, question, discuss, and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points." Gilbert S. Merritt, *Judges on Judging: The Decisionmaking Process in Federal Courts of Appeals*, 51 OHIO STATE L.J. 1385, 1386-87 (1990). Because oral argument proceedings "come at a crucial time" in the process—immediately before the judges confer and vote on the case—oral argument has a unique ability to "focus[] [a judge's] thought and reflection" and "present the possibility for fresh perspectives on a case." Timothy R. Johnson, *The Influence of Oral Argument on the U.S. Supreme Court*, AM. POL. SCI. REV., Vol. 1000, No. 1 at 99 (quotation omitted); see also Merritt, 51 OHIO STATE L.J. at 1387.

In addition, oral argument is "an essentially collegial function" that promotes debate and collective decision-making by the judges. In effect, oral argument is "the preliminary conference for deciding the case." Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Oral Argument*, 33 STETSON. L. REV. 139, 142 (Fall, 2003). As "one of only two occasions on which the judges get together to consider the case," it "provides an important forum for [the] interchange of ideas between

* * * the judges." Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 37 (Oct. 1986); Stanley Mosk, *In Defense of Oral Argument*, 1 J. OF APP. PRACTICE AND PROCESS 25, 26 (Winter 1999). Questions posed by one judge during argument may stimulate the thinking of another judge on the panel and may even "convince a doubtful colleague who had previously indicated reservations to reach a preferred conclusion." *Ibid.* As Senior Judge Frank Coffin of the First Circuit Court of Appeals put it,

> By their questions and comments to counsel, judges telegraph their concerns and preferences to other judges. Oral argument is really the first stage of the conferencing among the judges. How often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was more, much more to the case than met my eye.

Mosk, 1 J. OF APP. PRACTICE AND PROCESS 27 (quoting Hon. Frank M. Coffin, ON APPEAL: COURTS, LAWYERING, AND JUDGING 132-33 (1994)).

Moreover, oral argument gives counsel an opportunity to respond directly to the particular concerns that the judges might have about the case. Justice Scalia aptly characterized the practice of many judges when he said, "I use [oral argument] to give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'" Hatchett & Telfer, 33 STETSON. L. REV. at 142. Attorney responses to such questions from the bench "may alter a previous tentatively reached conclusion," and may help

focus the judges on what counsel believes are the important facts and legal principles. Mosk, 1 J. OF APP. PRACTICE AND PROCESS at 27. In short, oral argument "brings the specific decisional process into the open," "gives new insight into the judge's view of the case," and gives counsel an opportunity to respond to the judges' concerns. Michael E. and Jane B. Tigar, FED. APPEALS JURIS. & PRACTICE, § 10.1 (1997).

This opportunity can be invaluable, particularly because oral argument frequently "develops a new issue overlooked or not adequately briefed" by the parties. Mosk, 1 J. OF APP. PRACTICE AND PROCESS at 26.[7] Comments made by the judges during oral argument "may show the advocate that something vital is missing from the briefs, or that an important piece of evidence has been overlooked." Tigar, FED. APPEALS JURIS. & PRACTICE, § 10.1. In such cases, oral argument is counsel's only chance to respond to the judges' concerns before the case is decided, and it gives the court an opportunity to order supplemental briefing on potentially dispositive issues that were not initially briefed. *Ibid.*

The rigorous dialogue between judges and counsel and between the judges themselves may well influence the outcome of the case. Oral argument "help[s] [judges] come to terms with what are often complex legal and

---

[7] Professor Johnson's comprehensive studies of oral arguments presented before this Court demonstrate that the Court frequently "uses oral arguments to obtain information beyond that which is provided by the parties" in the briefs. Timothy R. Johnson, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 55-56, State University of New York Press, 2004. Indeed, Professor Johnson concludes that "[a]lmost 80 percent of all the * * * questions" posed by justices during oral argument "refer to arguments that were not raised in the[] briefs." *Id.* at 126.

factual issues," and strongly influences decisions on the merits. Johnson, AM. POL. SCI. REV., at 112. In short, "oral arguments matter to the decision of the case." *Ibid.*

The opportunity to engage the judges directly in open court is particularly important in vindicating the rights of the wrongfully convicted. Oral argument is "the right to be heard made concrete." Merritt, 51 OHIO STATE L. J. at 1387. Through oral argument, the wrongfully convicted are given a chance to present their case directly to the judges who will decide their fate, to answer their questions through counsel, and to persuade them of the injustice of their conviction. Oral argument also allows a wrongfully convicted defendant to have his voice heard in open court, reinforcing the appearance of a fair and open appellate proceeding.[8] It also brings allegations of serious trial error and unjust convictions to the clear light of day, enabling members of the public to hear and understand them. This promotes transparency in the justice system and judicial accountability, which serves the interests of the wrongfully convicted and the broader public.

---

[8] This legitimizes the authority of the reviewing court and promotes public confidence in the legal system. See Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478, 1484 (1983) ("the fact that [judges] actually listen to, question, and may be directly moved by litigants [during oral argument] is imperative to the respect the public grants [them] and the authority that flows from that respect"); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 919 (Spring 1995) ("An important value of oral argument lies in the legitimating function of allowing the litigants to address the decisionmaker face to face.").

B. Federal courts of appeals are denying oral argument with increasing frequency, particularly on collateral review.

Despite the obvious value and importance of oral argument in the review of criminal convictions, it is now the exception rather than the rule. Throughout the past several decades, federal courts have been steadily cutting back on oral argument. A study conducted in 1990 found that between forty and fifty percent of appeals decided on the merits by the federal courts of appeals were decided without oral argument. Baker, 22 FLA. ST. U. L. REV. at 916. The study also found that when oral argument was allowed, it was usually abbreviated—frequently to fifteen minutes per side. *Id.* at 917.

This trend is only getting worse. According to statistics published by the Administrative Office of the U.S. Courts, only 30.1% of all appeals terminated on the merits in the federal courts of appeals during the twelve-month period ending September 30, 2005 were decided after oral argument, with 69.9% decided on the briefs. See Judicial Business of the United States Courts, 2005 Annual Report of the Director, Supplemental Table S-1, available at http://www.uscourts.gov/judbus2005/tables/s1.pdf.[9] The rate is even lower for criminal appeals. Of 8,614 criminal appeals terminated on the merits during that twelve-month period, only 2,436 (or 28.3%) were afforded oral argument. *Id.*, Appendix: Detailed Statistical Tables, Table B-1A, available at http://www.uscourts.gov/judbus2005/appendices/b1a.pdf.

This widespread increase in denials of oral argument is particularly pronounced in appeals of federal habeas claims. Federal judges consistently deny oral argument

---

[9] The rate of oral argument was lowest in the Fourth and Eleventh Circuits (15.8% and 15.4%, respectively). *Ibid.*

at a substantially higher rate in these types of appeals. Of the 636 non-capital habeas appeals actually decided on the merits during the same twelve-month period, only 109 (or 17.1%) received an oral hearing. *Ibid.* The remaining 82.9% were decided on the briefs. *Ibid.* As noted, 30.1% of all appeals (and over 28 percent of all criminal appeals) are decided following oral argument. Thus, the appellant in a habeas case is *almost twice as likely* to be denied oral argument in a federal appellate court as the average appellant.

C. The widespread denial of oral argument on direct and collateral review increases the likelihood that wrongful convictions will stand.

The increasing tendency of federal courts of appeals to decline oral argument on direct and collateral review of criminal convictions undermines their ability to detect error and increases the likelihood that they will erroneously affirm wrongful convictions. Studies show that cases decided without oral argument "are likely to be affirmed and are affirmed at a higher percentage than cases afforded an argument." Baker, 22 FLA. ST. U. L. REV. at 917; see also Bright, 72 IOWA L. REV. at 43 ("nonargued cases almost invariably result in an affirmance of the district court's decision"); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 280-81 (January 1996). This is not surprising, because cases that are not argued do not receive the sustained, focused attention from an entire panel of judges that argued cases receive.

Unlike a case which has received oral argument, "no collegial conference between the judges accompanies the disposition of the nonargument case." Rather, non-argument cases are typically "pre-assigned to the lead

judge." Bright, 72 IOWA L. REV. at 43. This "makes it less likely that the panel will focus on the case at the same time," Baker, 22 FLA. ST. U. L. REV. at 922, and it increases the likelihood that the resulting opinion will be "essentially the product of one judge and that judge's staff" rather than the considered judgment of the entire panel. Bright, 72 IOWA L. REV. at 43; see also Baker, 22 FLA. ST. U. L. REV. at 922-23. Indeed, even the judge to whom the non-argued case is assigned is likely to devote less attention to the case than he would if it were argued and to rely more on staff attorneys than he otherwise would. Cecil & Stienstra, FEDERAL JUDICIAL CTR. 87-5, at 68; Baker, 22 FLA. ST. U. L. REV. at 922.

In addition, non-argued cases do not benefit from the "free interchange of ideas pursued at oral argument," which "increases the court's ability to reach the right and just result." Bright, 72 IOWA L. REV. at 38. And deciding an appeal without oral argument makes judges "less accountable to litigants, and decreases the visibility of the appellate process." Baker, 22 FLA. ST. U. L. REV. at 922.

For all these reasons, the wholesale denial of oral argument makes it more likely that some wrongful convictions will be erroneously affirmed on appeal. This "represents a profound threat to a critical part of the appellate function." *Ibid.* Indeed, one commentator has concluded that "the design of the system has been compromised, severely and profoundly, and possibly irretrievably, by such proportionally high rates of denial of oral argument." *Id.* at 920. At a minimum, the courts' current practice of denying oral argument in the majority of appeals contravenes the purpose of Rule 34 by "revers[ing] the presumption in favor of oral argument in every appeal to what amounts to a de facto presumption that most appeals can be decided without oral argument." *Id.* at 923. As one commentator aptly noted, this practice

renders Rule 34's promise of oral argument "Orwellian." *Ibid.*

The pernicious effects of the routine denial of oral argument are likely to be greatest in appeals of federal habeas cases. As noted, federal courts deny oral argument at a substantially higher rate in these types of appeals. Thus, these cases are even less likely to benefit from the focused judicial attention that oral argument brings. This diminishes the effectiveness of collateral review and further increases the risk of wrongful convictions.

In addition, the widespread denial of oral argument in appeals of federal collateral proceedings is particularly inappropriate, because such appeals *have already been determined to be non-frivolous* by at least one federal judge. The federal post-conviction statutes contain a screening procedure designed to preclude frivolous appeals. A federal district court's denial of a petition for collateral relief under § 2254 or § 2255 may not be appealed unless either the district court or the court of appeals first issues a certificate of appealability, which may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(1)-(2). Appeals that pass this statutory screening procedure (like Mr. Miller's) have already been determined not to be frivolous. Under these circumstances, it is particularly inappropriate to deny oral argument.

D. The denial of oral argument in this case directly violated FRAP 34(a)(2) and was otherwise inappropriate.

Even if it is appropriate to limit oral argument in certain cases, denying oral argument was clearly wrong in Mr. Miller's case. This is true for several reasons. First, the panel's denial of oral argument in Mr. Miller's case

directly flouted Rule 34. Rule 34 guarantees oral argument unless "a panel of three judges who have examined the briefs and record *unanimously agree* that oral argument is unnecessary[.]" Fed. App. Civ. P. 34(a)(2) (emphasis added). It therefore gives a single judge the right to require the panel to hear oral argument even where the remaining judges on the panel think it unnecessary. This "assures that each case receives the attention thought appropriate by the most cautious judge on the panel." Cecil & Stienstra, FED. JUDICIAL CTR. 87-5, at 161; see also Pet. at 12. Nevertheless, the panel in this case denied oral argument even though one member of the panel expressed a preference for oral argument and dissented on that basis. This is a clear violation of the plain terms of Rule 34.

The Seventh Circuit's violation of Rule 34 in this case is by no means an isolated occurrence. Several other federal appellate panels have denied oral argument over the objections of a dissenting judge who expressed a desire for oral argument. *See, e.g.*, *Gravatt* v. *Paul Revere Life Ins., Co.*, No. 02-17028, 2004 WL 1257716, at *67 (9th Cir. 2004) (Wallace, J., dissenting); *United States* v. *Lambert*, 963 F.2d 711, 719 (5th Cir. 1992) (Wisdom, J., concurring and dissenting); *Bowers* v. *DeVito*, 686 F.2d 616, 619 (7th Cir. 1982) (Wood, J., dissenting). But such cases may represent only the tip of the iceberg. Because violations of the Rule come to light only in the rare cases involving written dissents, as in Mr. Miller's case, we have no way of knowing for certain how frequently such violations occur. However, a recent study that examined federal circuit court screening procedures for oral argument suggests that violations of the spirit—if not the letter—of Rule 34 may be common. That study found that the decision whether to grant oral argument was in practice driven more by the individual circuit judge's "attitudes toward oral argument" than by the court's

formal screening protocol, and that "many judges share a concern that there is a kind of judicial peer pressure in screened appeals making them reluctant to state a preference for oral argument." Baker, 22 FLA. ST. U. L. REV. at 921-22.

Second, as noted, Mr. Miller's appeal passed the rigorous initial screening under § 2253(c). In issuing a certificate of appealability, the district court stated that it could not "say that a reasonable judge would not make a different decision" regarding Mr. Miller's ineffective assistance of counsel claim. Pet App. 16a. Thus, it was inappropriate for the panel to assume that Mr. Miller's claim did not merit oral argument, particularly in light of the dissenting judge's statements to the contrary.

Third, the issue presented in Mr. Miller's appeal was manifestly not frivolous. As Mr. Miller argued in his brief on appeal, the Seventh Circuit's resolution of his claim was inconsistent with authority from another circuit. See Pet. 15-18. The Government did not treat Mr. Miller's appeal as frivolous or suggest that it was eligible for summary disposition. Indeed, as the dissent noted, both Mr. Miller and the Government carefully and thoroughly briefed the issue. In sum, both parties gave careful consideration to the appeal in their briefs, and the appeal deserved a correspondingly careful review by the Court, including oral argument.

For all these reasons, this Court should grant Mr. Miller's Petition for Certiorari to enforce the requirements of Rule 34(a)(2) and to prevent the increasingly widespread violations of the Rule.

CONCLUSION

For the foregoing reasons, the undersigned *Amici* urge this Court to grant Mr. Miller's Petition for Certiorari.

Respectfully submitted,

STEVEN A. DRIZIN
Center on Wrongful Convictions
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60610
(312)503-3100

LINDA T. COBERLY
Counsel of Record
GENE C. SCHAERR
STEVEN J. WINGER
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-8768

February 2007